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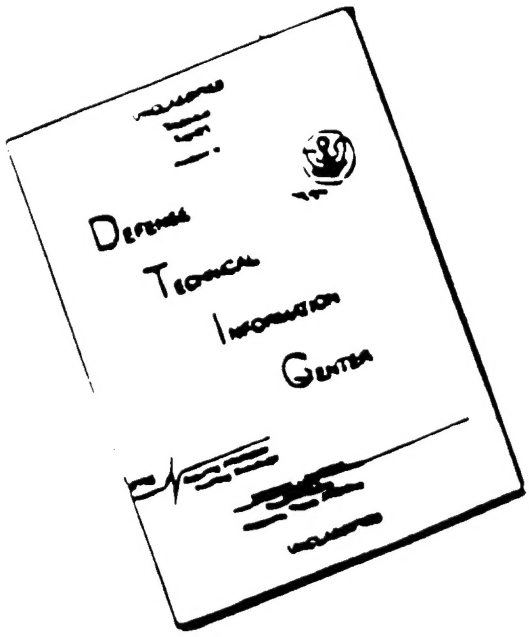

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SENIOR OFFICERS LEGAL ORIENTATION

The Judge Advocate General's School
United States Army
Charlottesville, Virginia
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SENIOR OFFICERS' LEGAL ORIENTATION

CRIMINAL LAW TEXT

PREFACE

This text is prepared by the Criminal Law Division, The Judge Advocate General's School, for the Senior Officers' Legal Orientation (SOLO) course. This text and the references provide background reading and research materials for the course. They also form the basis of the legal instruction presented at the Pre-Command Course conducted at Fort Leavenworth, Kansas. This deskbook may also serve as a convenient source of legal information for the commander in the field and as a guide to understanding the many criminal law problems which confront today's Army commander. The local staff judge advocate should be consulted on any legal problem which arises in the field of criminal law.

SOLO CRIMINAL LAW DESKBOOK

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CHAPTER 1

INTRODUCTION TO CRIMINAL LAW

Introduction

We grow up believing that the law is fixed and eternal, but in reality, the law is man-made, fallible, dynamic, and ever-changing. Today's commander must be aware of the system that exists and strive to apply it fairly and with intelligence. This book will assist you in understanding the Uniform Code of Military Justice and the Manual for Courts-Martial, and in utilizing the military justice system.

It is not the purpose of this book to make you an expert in military justice. Rather, it is to expose commanders to the major requirements of military justice. This book is not intended to replace the basic sources to which it refers, nor to do your thinking. It is only an aid, to be applied with sound discretion and mature judgment. There is a recurring theme throughout this guide; that is, the commander must seek the advice and assistance of the staff judge advocate. The "SJA" is your expert and adviser on military law; don't wait until your problem is out of control before seeking the staff judge advocate's counsel and advice.

A. Sources

1. The Constitution. The basic source for the separate system of criminal law in the military is the Constitution of the United States. Article I, section 8, of that document provides that Congress shall have the power to "make Rules for the Government and Regulation of the land and naval Forces."

2. The UCMJ. In 1950, Congress used its constitutional powers to enact the Uniform Code of Military Justice (UCMJ), which was substantially revised by the Military Justice Acts of 1968 and 1983. This statute provides a separate system of military criminal law for the armed services, much the same as the State of California and the State of Maryland have separate systems of criminal justice to meet their societal needs.

3. The Manual for Courts-Martial. Like most other statutes, the Uniform Code of Military Justice requires a detailed set of rules to supplement and explain its various provisions. Article 36 of the UCMJ authorizes the President to make rules prescribing the procedures

to be followed before military tribunals, including the rules of evidence. In addition, Article 56 empowers the President to establish the levels of punishment for most offenses. These rules are issued in the form of an Executive Order by the President and are found in the Manual for Courts-Martial, 1984. Therefore, the Manual has the force and effect of law, and compliance is mandatory.

4. Army Regulations. In addition to the Manual, AR 27-10, Military Justice, fine tunes the everyday administration of military justice. This regulation announces additional rules and procedures which must be followed. Furthermore, supplemental military justice regulations have been issued by many local commands. Commanders must also consult and comply with these regulations.

5. Court Decisions. While the Manual and Army regulations supplement and explain the UCMJ, the various courts involved with military criminal law interpret all of these sources of law. The Supreme Court of the United States and lower federal courts hear cases involving military criminal law. These cases are usually limited to (1) appeals based upon lack of jurisdiction and (2) appeals based upon a denial of some constitutional right. The United States Court of Appeals for the Armed Forces is the highest appellate court within the military judicial structure. This court is composed of five civilian judges appointed by the President. In addition, there is the United States Army Court of Criminal Appeals, an intermediate appellate court of review consisting of military appellate judges. The decisions of these courts interpreting statutes and regulations have the force of law and are binding upon commanders.

6. The Staff Judge Advocate. You can readily see from the above discussion that the sources of military criminal law are varied. To solve most military justice problems, you must refer to one or all of these sources. This is what the staff judge advocate is trained to do. The SJA is your legal adviser. Just as corporations consult with their general counsel before making legal and business decisions, commanders should contact their staff judge advocate for advice in dealing with disciplinary problems.

B. Background and Development

1. Background. The UCMJ had its beginnings early in our history. Rules for the government of our Army have been in force since the time of the American

Revolution, initially in the form of the Articles of War. The first Articles of War were adopted by the Second Continental Congress on 30 June 1775, just three days before George Washington took command of the Continental Army. These Articles were patterned after the British Army Articles, which were derived from earlier European articles traceable to the middle ages. Our system of military justice is the product of centuries of experience in many countries. Our present UCMJ is not, however, an outmoded historical relic. On the contrary, while retaining the substance of what has proven sound, Congress has periodically reconsidered and revised the military justice system to reflect new knowledge, experiences, and law.

2. The Uniform Code of Military Justice, 1950. The UCMJ was a significant revision in the military criminal law system. It combined the laws formerly governing the Army, Navy, and Air Force into one uniform code which governs all armed forces of the United States.

3. The Military Justice Act of 1968. A major revision of the Code and the Manual occurred with the Military Justice Act of 1968. The revised Code and Manual incorporated changes in the law since 1951 and substantially modified the military justice system.

Among the changes brought about by the 1968 Act is a provision which gives soldiers the right to a qualified lawyer at a special court-martial in all but the rarest of circumstances. Article 27(c) provides an accused with representation by a qualified lawyer except where a lawyer cannot be obtained due to physical conditions or military exigencies. AR 27-10, Military Justice, paragraph 5-5a, goes even further by mandating that in all special courts-martial the accused must be afforded the opportunity to be represented by qualified counsel. Remember, this right to counsel is in addition to the accused's right to hire a civilian lawyer.

The Military Justice Act of 1968, as implemented by AR 27-10, para. 8-1c(1), also provides that a military judge will be detailed to special courts-martial unless precluded by physical conditions or military exigencies. The Military Justice Act of 1968 also gives an accused the right to request trial by a military judge alone in all cases except those which are referred to trial as capital cases. If the accused elects trial by judge alone, the military judge determines the guilt or innocence of the accused and, if there is a finding of guilty, the sentence. The Act also placed a number of added responsibilities upon the military judge. Under

the Act the military judge is the presiding officer of the court-martial. The judge makes all legal and procedural rulings at trial and cannot be overruled on these decisions.

4. The Military Justice Act of 1983 substantially revised the Uniform Code of Military Justice. In an effort to improve the efficiency and administration of our military justice system, several necessary changes were made. The Act relieved commanders of the administrative burden connected with personally excusing court-members before trial, eliminated requirements that commanders make certain legal determinations, and alleviated many redundancies that existed in the system. The most significant revisions in the Act provide for direct review of Court of Military Appeals decisions by the United States Supreme Court and authorized Government appeal of certain rulings by military judges at the trial level. This major revision was incorporated into the 1984 Manual for Courts-Martial and took effect on 1 August 1984.

The Military Justice Amendments of 1986, signed on 14 November 1986, further refine the military justice system. The most significant change involved the expansion of court-martial jurisdiction to reach reserve component soldiers who commit offenses while in an Inactive Duty Training (IDT) status. In addition, the Act authorized, in limited circumstances, reserve component soldiers to be involuntarily called to active duty for the purpose of trial by court-martial, investigation under Article 32, UCMJ, or nonjudicial punishment.

After 1986, several national defense authorization acts made many minor changes to the UCMJ. For example, the Defense Authorization Act for Fiscal Year 1993 amended both the rape and drunk driving articles.

b. Changes to the Manual for Courts-Martial.

In 1980, the Joint Service Committee on Military Justice rewrote the Manual for Courts-Martial which took effect on 1 August 1984, replacing the Manual for Courts-Martial, 1969 (Rev. ed.).

5. The Trend. The trend in military justice legislation and court decisions is to increase the efficiency of our criminal justice system while balancing and protecting the rights of the accused. In light of these developments and continued public scrutiny of military justice matters, commanders must have a thorough

knowledge of the system, and seek the advice of the staff judge advocate on all but routine matters.

C. Why a Separate System of Military Justice?

One of the unique features of our military society is its separate system of criminal justice. Most justice problems involving military personnel are resolved within this separate military justice system and only infrequently reach civilian criminal courts. Why do we have a separate justice system?

The succinct answer is: mission and location. The mission of the military is to defend the United States. No other institution has this mission. Because of this, many crimes in the military--AWOL, disobedience, disrespect--have no counterpart in civilian law. Our military justice system must also function in wartime as well as in peacetime. This raises not only substantive, but geographical problems for our state or federal civilian systems. Would a state or federal court be available in every part of the world where the United States might go to war? The answer is clearly no. Further most state and federal laws are not extraterritorial, that is, they do not reach to foreign lands. Accordingly, we have our own military justice system that reinforces the military mission and goes wherever we go.

It is inevitable in a democratic society such as ours that the military justice system is compared with the civilian court system. While there are differences, in almost every instance, military accuseds receive rights and protections equal to or superior to those enjoyed by civilian defendants. Commanders, however, must continue to administer military justice with utmost fairness and efficiency. By doing so, the trust and confidence bestowed upon commanders by the American people and the Congress will be preserved.

D. Jurisdiction of Courts-Martial

1. Active Duty Jurisdiction. On June 25, 1987, the Supreme Court decided the case of Solorio v. United States. This case dramatically changed the rules concerning court-martial jurisdiction. The Court held that jurisdiction of a court-martial depends solely on the accused's status as a member of the armed forces, and not on whether the offense is service-connected. The case overruled the "service-connection test" established by the Court in O'Callahan v. Parker, a 1969 decision.

Now jurisdiction will be established by simply showing that the accused is a member of the armed forces.

Solorio creates a situation where both the military and civilian authorities may have jurisdiction over a soldier and his offense, e.g., an offense committed off post. This will require SJA coordination with the local civilian prosecutor. Between the two, they will decide who can best prosecute the offender.

Civilians, including family members, are not subject to courts-martial jurisdiction. If they commit offenses on post, they may be tried in the local state, federal, or host nation court. Commanders should consult with their SJA when issues arise involving misconduct by civilians.

2. Jurisdiction over Reservists. As a part of the Military Justice Amendments of 1986, Congress amended Articles 2 and 3 of the UCMJ. The new amendments extend jurisdiction over reservists during all types of training; in short, if the reservist is training, he or she is subject to military jurisdiction for crimes committed during the training period. The most significant change allows the military to exercise authority over reservists who commit crimes while performing weekend drill in IDT status.

Recognizing that IDT periods are brief, usually lasting only one weekend, the amendments to Article 3 allow reservists to return home at the end of IDT drill without divesting the military of jurisdiction. As a result, nonjudicial punishment may be handled during successive drill periods. Specifically, while punishment can be imposed during one drill period, it can be served during successive drill periods. Additionally, under the new Article 2(d), the government can order to involuntary active duty those reservists who violate the UCMJ during a training period. Reservists can be involuntarily ordered to active duty for Article 32 investigations, courts-martial, and nonjudicial punishment.

Familiarity with the changes in reserve jurisdiction is essential for active duty convening authorities because all general and special courts-martial will be tried at the active duty post which supports the reserve component unit (includes National Guard units when federalized). Additionally, only the active duty general court-martial convening authority can authorize an involuntary recall to active duty of a reservist for the purpose of an Article 32 investigation, court-martial, or nonjudicial punishment. Army Regulation 5-9, appendix

B-1, contains a list of active duty posts and the areas they support with regard to reserve component legal matters.

3. Jurisdiction and Convening Authority.

A general court-martial convening authority may, pursuant to AR 27-10, para 5-2a(2), establish contingency plans which, when ordered executed, designate provisional units whose commanders may convene special courts-martial. A deploying general court-martial convening authority may, for example, establish a rear detachment whose commander has special court-martial convening authority.

A superior convening authority may withhold the authority of a subordinate convening authority to dispose of individual cases, types of cases, classes of offenders, or generally. A general court-martial convening authority establishing area court-martial jurisdiction is an example of a superior convening authority withholding authority from subordinate convening authorities. Establishing area court-martial jurisdiction usually results in more expeditious processing of military justice actions.

E. The Commander's Role in Military Justice

1. The Increasing Burden. Anyone who has compared the size and weight of the 1951 Manual for Courts-Martial with the 1969 or 1984 editions knows that military criminal law has greatly expanded in the past decades. The law of search and seizure, self-incrimination, lineups, and many other areas has burgeoned. Also, commanders now confront new civil and administrative legal problems in the areas of personnel law, environmental law, funding requirements, and labor law--to name only a few. In all contexts, the legal decisions commanders must make are increasingly technical. To help resolve these problems, the Judge Advocate General's Corps conducts training for commanders, provides military lawyers to commanders at all levels, and in many instances relieves commanders of administrative burdens associated with those increasing responsibilities.

2. The Commander and the Defense Function. The military defense counsel is frequently the lightning rod for criticism and hostility directed at the legal protections of the accused. Defense counsel occasionally succeed in getting cases dismissed because of excessive government delay, in having evidence excluded because of

illegal searches or interrogations, and in winning acquittals or lenient sentences for the accused. In response, some have suggested, in a variety of phrases, that the military defense counsel ought to "ease off," ought to do less than can be done in order to ensure that "justice" is accomplished. ANYTHING LESS THAN FULL AND ZEALOUS REPRESENTATION WITHIN THE LIMITS OF THE LAW IS INSUFFICIENT UNDER ETHICAL AND CONSTITUTIONAL STANDARDS. The defense counsel who does not fully and vigorously represent a client is professionally derelict. Those who fear that defense counsel are unfettered in their efforts for the accused should be aware that counsel practice under strict criteria of professional conduct; these are found in the UCMJ itself, the Manual for Courts-Martial, the Rules of Professional Conduct for Lawyers (AR 27-26), and ethical standards established by the American Bar Association. These criteria are vigorously enforced. The Judge Advocate General's Professional Responsibility Advisory Committee investigates allegations of counsel misconduct and recommends disciplinary action to The Judge Advocate General.

Unfortunately, recent changes in military law may have given new company grade commanders less tolerance for the defense function. Before the 1968 legislation which injected military lawyers into special courts-martial, officers from all branches prosecuted and defended cases in that forum. That experience created an understanding for both the prosecution and defense role. Without this experience, new commanders participate only in the law enforcement or court member functions. Some tend to be intolerant of the defense function. Many commands alleviate this problem by providing young Army leaders a more balanced picture of the prosecution and defense function through temporary assignment to local JAG offices and other educational programs. These include requiring lieutenants to attend the court-martial of a member of the battalion and officer professional development classes taught by judge advocates.

On a practical level, commanders should recognize that defense counsel are fellow officers who provide an important service to the command. They should acknowledge the importance of this service by following these simple rules: 1) allow the defense counsel easy access to you and your soldiers to discuss a case or locate a witness; 2) provide soldiers with a copy of the Article 15 specification(s) and witness statements so the defense counsel can provide thorough and proper advice on whether to accept the Article 15 proceeding; and (3) avoid derogatory comments, instead teach your officers

and NCOs the importance of the defense functions.

3. The Commander's Prosecutorial Discretion. One of the commander's greatest powers in the administration of military justice is the exercise of prosecutorial discretion--to decide whether a case will be resolved administratively or referred to trial, and what the charges will be. The Manual for Courts-Martial mandates two rules in this area. First, cases should be resolved in a timely manner at the lowest possible level consistent with the seriousness of the offense and the record of the offender.

Secondly, a commander should refer a case to a court-martial only when there are reasonable grounds to believe a crime was committed and the accused did it. Although further advice can be sought from your staff judge advocate, the commander must ultimately decide how to dispose of alleged misconduct.

Any decision should be made with an understanding of the array of alternatives. Military justice procedures are not always the best way to dispose of disciplinary problems; courts-martial and Article 15's are sometimes slow, cumbersome, and blunt instruments, unsuited to the incident, the accused, or the commander's purpose. Short of military justice remedies, a variety of administrative alternatives exist:

a. Counseling.

b. Written or oral reprimands and admonitions.

c. Withdrawal of pass privileges.

d. Withdrawal or limitation of other privileges--commissary, PX, on-post driving, etc.

e. Extra training.

f. Alcohol and drug rehabilitation programs.

g. Administrative separation.

h. EER and OER.

i. MOS reclassification.

j. Reduction for inefficiency.

k. Bar to reenlistment.

l. Compassionate reassignment.

m. Transfer.

And the list goes on. The rapid development of these alternatives to court-martial has highlighted the past decade of military law, and with almost all of these remedies, the power to take final action has been passed down to field commanders. In the case of any minor incident, the commander exercising prosecutorial discretion should first decide that none of the varied administrative remedies is sufficient before considering punitive options.

The decision to refer offenses to trial by court-martial is difficult. Occasionally the decision is made for the wrong reasons. When an apparently serious offense occurs, there is great pressure on a commander to "do something." Congressional inquiries and expressions of interest in the incident from higher command tempt some to refer cases to trial to settle the matter. "Let the court decide whether or not the accused is guilty." A CASE SHOULD NEVER BE REFERRED TO TRIAL UNLESS THE CONVENING AUTHORITY IS PERSONALLY SATISFIED THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT THE ACCUSED COMMITTED THE OFFENSE AND SHOULD BE PUNISHED. The perceptive commander will find occasions when the accused's conduct satisfies the legal elements of a crime, but for reasons of compassion, interests of justice, or other considerations, the accused should not be punished. Similarly, commanders must not refuse to use the military justice system in order to create a rosy statistical picture of morale and discipline; serious crime is an unfortunate but inevitable facet of human conduct and should be prosecuted.

The military justice system requires commanders to exercise Solomon-like judgment--and, if necessary, to stand alone for the right as they see it. At all times the staff judge advocate or legal advisor is available to advise, but the final decision rests with commanders.

In any case of public interest, a commander's decision will be examined and reexamined in the public arena. Because of restrictions on pretrial publicity, commanders are often unable to defend decisions in public. Do not permit possible public reaction to deter you from making a decision you believe is correct. Think long and hard in making these decisions, and ensure that

the decision to refer a case to trial on particular charges can withstand the kind of close scrutiny it may receive. This does not mean that you should hesitate to take necessary disciplinary action or tolerate an atmosphere of permissiveness. Rather, your actions must be proportionate to the misconduct you seek to sanction.

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CHAPTER 1

INTRODUCTION TO CRIMINAL LAW

TEACHING OUTLINE

At least since the harsh days of Gustavus Adolphus, governments have striven to strike a perceived balance of fairness in substantive and procedural law as applied to members of the military force, a balance which primarily takes into account the vital mission of the force itself. Often this balance is described in a specialized criminal code.

General William C. Westmoreland
Major General George S. Prugh
Harvard Journal of Law and Public Policy 1 (1980)

I. **TRENDS.** (see charts - pp. 1-19 & 1-20).

II. **MILITARY JUSTICE SYSTEM--LEGAL BASIS.**

A. Constitution of the United States.

Article I, section 8, clause 14. "The Congress shall have Power . . . to make rules for the Government and Regulation of the land and naval Forces."

B. Uniform Code of Military Justice.

1. Congress exercised its power in 1950 to provide one statute to govern all the Armed Forces.

2. Provides President with authority to decide pretrial, trial, and post-trial procedures (Article 36) and maximum punishments (Article 56).

C. Manual for Courts-Martial.

1. Executive Order of the President; implements Congress' grant of authority to decide procedures and maximum punishments.

2. Organized into five parts plus appendices.

I. Preamble

II. Rules for Courts-Martial (R.C.M.)

III. Military Rules of Evidence (M.R.E.)

IV. Punitive Articles

a. Text of Article from UCMJ
b. Elements of the offense
c. Explanation
d. Lesser included offenses
e. Maximum punishment
f. Sample specification

V. Nonjudicial Punishment Procedure

VI. Appendices (currently 23)

a. Constitution
b. U.C.M.J.
c. Appendices of forms, Trial Guides, Analysis

D. Regulation.

AR 27-10 prescribes the policies and procedures pertaining to the administration of military justice within the Army and implements the Manual for Courts-Martial, United States.

E. Court Decisions.

III. THE MILITARY COURT SYSTEM.

A. Trial Courts (see charts - pp. 1-21 & 1-22).

1. Summary Court-Martial.

2. Special Court-Martial.

3. BCD Special Court-Martial.

4. General Court-Martial.

B. Appellate Courts.

1. Courts of Criminal Appeals (formerly Courts of Military Review).

   Appellate military judges review cases in which sentence includes death, punitive discharge (Dismissal, DD, BCD) or confinement for one year or more.

2. United States Court of Appeals for the Armed Forces (CAAF) (formerly Court of Military Appeals).

   Five civilian judges review cases in which death penalty is adjudged, The Judge Advocate General certifies for review, or the court grants accused's petition for review.

3. United States Supreme Court.

   Accused or government may appeal cases decided by the CAAF to the Supreme Court.

IV. THE MILITARY JUSTICE SYSTEM -- PERSONNEL.

A. Commander.

B. Staff Judge Advocate.

C. Trial Counsel.

D. Defense Counsel.

E. Military Judge.

F. Court Members.

G. Legal Specialist/Court Reporter.

IV. JURISDICTION.

A. Court.

1. Court must be promptly convened.

2. Area court-martial jurisdiction.

3. Designation of court-martial convening authority.

B. Person.

Accused must be subject to court-martial jurisdiction, i.e., a member of the armed forces.

C. Offense.

1. The offense must be subject to court-martial jurisdiction.

2. Court-martial jurisdiction depends on the accused's status as a member of the Armed Forces.

D. Reserve Jurisdiction.

1. UCMJ jurisdiction continues over Reservists after a period of active duty for any offenses committed during the active duty.

2. Reservists may be involuntarily recalled to active duty for court-martial, Article 32 investigations, and nonjudicial punishment.

VI. CONCLUSION.

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ARMY-WIDE COURTS-MARTIAL STATISTICS

	FY86	FY87	FY88	FY89	FY90	FY91	FY92	FY93	FY94
GCM	1,431	1,462	1,631	1,585	1,451	1,173	1,168	915	843
BCD	1,247	1,051	923	850	771	585	543	327	345
SPCM	271	214	182	185	150	92	70	45	32
SCM	1,373	1,492	1,410	1,365	1,121	931	684	364	349
TOTAL	4,322	4,219	4,146	3,985	3,493	2,758	2,465	1,651	1,569

CHAPTER 10

FY86	FY87	FY88	FY89	FY90	FY91	FY92	FY93	FY94
5,283	5,048	4,345	4,110	4,318	3,062	2,887	2,472	2,153

NONJUDICIAL PUNISHMENT STATISTICS

	FY86	FY87	FY88	FY89	FY90	FY91	FY92	FY93	FY94
ART 15s	111,750	99,886	91,915	83,413	76,152	60,269	50,066	44,207	41,753

OFFICER MISCONDUCT

	FY86	FY87	FY88	FY89	FY90	FY91	FY92	FY93	FY94
GCM	54	37	27	35	27	45	28	32	23
SPCM	0	0	0	0	0	1	0	0	1
ART 15s	269	254	207	262	220	254	179	145	83

GENERAL COURTS-MARTIAL

FY	Cases	Rate/ 1000	Conv Rate	Disch Rate	Guilty Pleas	Judge Alone	Courts w/Enl.	Drug Cases	Child Abuse
1989	1,585	(2.08)	95%	88%	63%	64%	25%	31%	8.2%
1990	1,451	(1.94)	95%	87%	61%	69%	20%	24%	10.0%
1991	1,173	(1.47)	95%	87%	58%	67%	18%	17%	10.0%
1992	1,168	(1.75)	94%	88%	60%	67%	19%	23%	14.2%
1993	915	(1.56)	94%	85%	56%	65%	24%	22%	12.4%
1994	843	(1.39)	93%	88%	60%	65%	26%	20%	14.4%

BAD-CONDUCT DISCHARGE SPECIAL COURTS-MARTIAL

1989	850	(1.12)	93%	63%	64%	69%	22%	26%	0.2%
1990	771	(1.03)	93%	62%	64%	70%	21%	23%	1.2%
1991	585	(.73)	93%	65%	61%	70%	20%	12%	2.5%
1992	543	(.82)	90%	64%	60%	68%	21%	16%	2.5%
1993	327	(.85)	85%	54%	51%	63%	29%	17%	3.3%
1994	345	(.71)	90%	54%	57%	58%	34%	24%	3.1%

OTHER SPECIAL COURTS-MARTIAL

1989	185	(.24)	81%	NA	40%	52%	36%	6%	0.5%
1990	150	(.20)	76%	NA	35%	57%	31%	4%	2.0%
1991	92	(.12)	82%	NA	46%	57%	27%	5%	1.0%
1992	70	(.11)	63%	NA	21%	50%	39%	3%	1.4%
1993	45	(.08)	51%	NA	20%	49%	33%	0%	4.4%
1994	32	(.03)	63%	NA	19%	50%	38%	9%	0.0%

SUMMARY COURTS-MARTIAL

FY	Cases	Rate/ 1000	Conv Rate	Pleas	Drug Cases
1989	1,365	(1.79)	94%	UNK	10%
1990	1,121	(1.50)	95%	42%	8%
1991	931	(1.17)	92%	33%	5%
1992	684	(1.03)	90%	37%	10%
1993	364	(.62)	86%	36%	10%
1994	349	(.56)	92%	35%	11%

NONJUDICIAL PUNISHMENT

FY	Total	Rate/1000	Formal	Summarized	Drugs
1989	83,413	(109.0)	80%	20%	10%
1990	76,152	(102.0)	79%	21%	6%
1991	60,269	(75.5)	80%	20%	5%
1992	50,066	(75.2)	79%	21%	7%
1993	44,207	(75.4)	78%	23%	6%
1994	41,753	(79.5)	78%	22%	7%

COURTS-MARTIAL IN THE ARMY

	Summary	Regular Special (SPCM)	Bad-Conduct Discharge (BCD) SPCM	General
Convening Authority	Battalion Cdr	Brigade Cdr	Division/Corps/Major Installation Cdr (GCM CA)	Division/Corps/ Major Installation Cdr***
Composition	One Commissioned Officer	Military Judge*, minimum of 3 court members	Military Judge,* minimum of 3 court members	Military Judge, minimum of 5 court members
Counsel	None detailed. Accused may consult consult with military lawyer prior to trial. May hire Civilian lawyer.	Trial Counsel (lawyer)** Defense Counsel (lawyer). Accused may request individual military legal counsel or hire civilian lawyer.	Same as SPCM	Same as SPCM (trial counsel must be a lawyer)
Accused's Options	May refuse by SCM.	May request enlisted personnel on court (minimum of 1/3 must be enlisted); may request trial by MJ alone.	Same as SPCM	Same as SPCM
Jurisdiction	Only enlisted personnel Noncapital offenses	All personnel Noncapital offenses	All personnel Noncapital offenses	All personnel All offenses
"Reporter"	Legal Specialist	Legal Specialist	Court Reporter	Court Reporter
Record of Trial	Abbreviated	Summarized	Verbatim	Verbatim

*There are provisions for convening a regular special court-martial without a military judge. A military judge must be detailed to a BCD SPCM unless prohibited by physical conditions or military exigencies. In practice, military judges are detailed to all special courts-martial.

**The trial counsel in a special court-martial need not be a lawyer. In practice the government is always represented by a lawyer.

***An investigation IAW Art. 32, UCMJ and a written pretrial advice by the SJA are prerequisites for referral to a GCM.

MAXIMUM PUNISHMENT CHART

Type	Confinement	Forfeitures	Reduction[1]	Punitive Discharge
Summary	1 Month[2]	2/3 pay per month for 1 month	E5 and above - one grade E4 and below - lowest Enlisted grade	None
Special	6 months[3]	2/3 pay per month for 6 months	Lowest Enlisted Grade	None
BCD Special	6 months[3]	2/3 pay per month for 6 months	Lowest Enlisted Grade	BCD[4] (enlisted)
General[5]	See Part IV, MCM, 1984 and Maximum Punishment Chart, Appendix 12, MCM	Total forfeitures of all pay and allowances	Lowest Enlisted Grade	BCD (enlisted DD (enlisted, appt. warrant officer) Dismissal (commissioned officer, incl WO)

[1]Only enlisted soldiers may be reduced by courts-martial.

[2]A summary Court-Martial may impose confinement and hard labor without confinement only on soldiers in the grade of E-4.

[3]A special Court-martial may impose confinement only on enlisted soldiers.

[4]In order to impose a BCD, A Special Court-Martial must:
(1) Be convened by a General Court-Martial Convening Authority.
(2) Have a military judge detailed (Unless a military judge cannot be detailed because of physical conditions or military exigencies).
(3) Have a defense counsel within the meaning of Article 27(b), U.C.M.J., detailed.
(4) Have a verbatim record of trial prepared.

[5]A General Court-Martial may impose the death penalty when authorized by Part IV, MCM, 1984, and the conditions in R.C.M. 1004 are met.

CHAPTER 2

OPTIONS AND DUTIES OF THE COMMANDER

PART I - COMMANDER'S OPTIONS

Introduction

At every level of command a number of options are available to a commander who is confronted by a military justice problem. This part concerns the various measures for dealing with an accused prior to trial as well as an examination of the various forums and administrative measures which a commander may use.

A. Pretrial Restraint

1. In General. Pretrial restraint is an actively developing area of the law. Also, some locations have other specific rules or procedures. Consult your local judge advocate. What if a soldier in your unit has committed an offense under the Uniform Code of Military Justice? What do you do with him or her pending court-martial? The short answer is "[a]n accused pending charges should ordinarily continue the performance of normal duties within his or her organization while awaiting trial." AR 27-10, para. 5-13a. Specific circumstances, such as the need to ensure the soldier's presence at trial, to prevent criminal misconduct such as intimidation of witnesses, injury to others, or threatening the safety of the community or the effectiveness, morale, or discipline of the command, may move a commander to place a soldier under pretrial restraint. UCMJ art. 10; R.C.M. 305(h)(2)(B). As the soldier is presumed innocent until convicted, the restraint may not be punishment and must be the least restrictive restraint adequate to meet the circumstances which require the restraint. UCMJ art. 13; R.C.M. 305(h)(2)(B)(iv).

2. Types of Pretrial Restraint. There are four types of pretrial restraint. From least severe to most severe they are:

a. Conditions on liberty. Conditions on liberty is defined as "orders directing a person to do or refrain from doing specified acts." R.C.M. 304(a)(1). Conditions on liberty would include orders to a soldier not to go to the location of an offense or not to approach a victim of an offense or witnesses. Conditions may be imposed separately or with other forms of

restraint. Imposing conditions on liberty does not trigger the 120-day speedy trial rule.

b. Restriction. Formally called "restriction in lieu of arrest," restriction is "the restraint of a person by oral or written orders directing the person to remain within specified limits." R.C.M. 304(a)(2). A soldier under restriction normally performs his or her usual duties. Common terms of restriction are, "to your place of duty, company (or battalion) area, dining facility, and chapel." Restriction triggers the 120-day speedy trial rule. (If "tantamount" to confinement, it may trigger more stringent rules; see Part II, paragraph F).

c. Arrest. "Arrest" is defined as orders "directing the person to remain within specified limits." R.C.M. 304(a)(3). The limits of arrest are generally tighter than those of restriction and a person in arrest does not perform "full military duties," such as commanding, bearing arms, or serving guard, but may "do ordinary cleaning or policing, [or] routine training and duties." R.C.M. 304(a)(3). The distinction between "arrest" and "restriction" is largely a matter of degree and is important as arrest triggers more stringent speedy trial requirements. The term of "arrest" as a form of pretrial restraint is distinguishable from the common civilian meaning, which is to take into custody. In military usage "apprehension" is the equivalent of "arrest" in civilian terminology. Arrest triggers the 120-day speedy trial rule and may trigger more stringent rules (see Part II, paragraph F).

d. Pretrial Confinement. Pretrial confinement is the physical restraint of a soldier pending trial. It also triggers the 120-day speedy trial rule and may trigger more stringent rules. (see Part II, paragraph F).

3. Administrative restraint. Administrative restraint is not the same as pretrial restraint. Limitations placed on a soldier for operational, medical, or other military purposes, independent of military justice are not pretrial restraint. "Administrative restraint" placed on a soldier pending trial, however, will be scrutinized to ensure it serves purposes wholly independent of military justice.

4. Authority to Order Pretrial Restraint. Generally, any commissioned officer may order the pretrial restraint of an enlisted soldier. Only the commander may order pretrial confinement of officers

within his command. Authority may also be withheld by a superior commander, which frequently occurs pursuant to local regulations. The commander must review the decision to order to pretrial confinement within 72 hours. Consultation with your legal advisor is always appropriate prior to imposing pretrial restraint.

5. Pretrial Confinement.

a. In General. As pretrial confinement is the most stringent pretrial restraint, specific procedures must be followed in putting a soldier in pretrial confinement. "In any case of pretrial confinement, the SJA concerned, or that officer's designee, will be notified prior to the accused's entry into confinement or as soon as practicable afterwards." AR 27-10, para. 5-13a. Upon confinement, the soldier must be informed of the nature of the offenses for which held, the right to remain silent and that any statement made may be used against him or her, the right to civilian counsel at no expense to the United States and to assignment of military counsel, and the procedures by which the confinement will be reviewed. R.C.M. 305(e). A soldier charged only with an offense normally tried by a summary court-martial will not ordinarily be put in pretrial confinement. When no court-martial charges are pending, a person pending administrative separation will not be placed in pretrial confinement.

b. Requisites For Pretrial Confinement. Pretrial confinement of a soldier is illegal unless:

> [T]he commander has probable cause (reasonable grounds) to believe that
>
> (i) An offense triable by a court-martial has been committed;
>
> (ii) The person to be confined committed it; and
>
> (iii) Confinement is necessary because it is foreseeable that:
>
> (a) The person to be confined will not appear at a trial, pretrial hearing, or investigation, or
>
> (b) The person to be confined will engage in serious criminal misconduct; and

(iv) Less severe forms of restraint are inadequate.

In Europe and some other places, the power of subordinate commanders to order pretrial confinement is withheld by the General Court-Martial Convening Authority and delegated to the SJA. The rationale for this delegation is that a military magistrate (usually a military judge) must review the pretrial confinement within 7 days of imposition to ensure it is legal. If illegal, the soldier will be released.

"'Serious criminal misconduct' includes intimidation of witnesses or other obstruction of justice, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States." R.C.M. 305(h)(2)(B). The soldier who is an "irritant" and a "pain in the neck" in the unit may not be confined on that basis, but the soldier who is a "quitter," who disobeys orders and refuses to perform duties, is an "infection" in the unit and may properly be confined. R.C.M. 305(h) analysis. Less severe forms of restraint must be considered first.

c. Commander's Memorandum. When the commander (or the SJA, depending on local procedures) determines that the requisites for pretrial confinement are met, the commander must document the determination in a memorandum. The "Checklist for Pretrial Confinement," DA Form 5112-R, satisfies the memorandum requirement. AR 27-10, para. 9-5b(2).

d. Prompt Determination of Probable Cause. Within 48 hours after a soldier enters pretrial confinement, a neutral and detached probable cause review of a warrantless apprehension must occur. The review may be conducted by a commander who is not an accuser or otherwise involved in the case or by an official designated to approve a commander's pretrial confinement decision. Local procedures will normally prescribe how the 48 hour review will be conducted.

e. Review of Pretrial Confinement by the Military Magistrate (the "neutral and detached officer" of R.C.M. 305(i)(2)). Within 7 days after a soldier enters pretrial confinement, the confinement will be reviewed by a military magistrate who will approve continued confinement or order the release of the soldier. If a soldier is ordered released from pretrial

confinement, he or she may not be confined again before completion of trial except upon discovery of new evidence or misconduct which justifies confinement either alone or together with all other available information.

6. Sentence Credit for Pretrial Restraint. A commander should consider that, if convicted and sentenced, a soldier will receive day for day credit on the sentence for pretrial confinement and for restriction or arrest which is "tantamount" to confinement. Restriction or arrest is "tantamount" or equivalent to confinement when the limits and conditions of restriction, taken together, show circumstances amounting to physical restraint. When a soldier is restricted to a relatively small area (such as to a floor of a barracks), has sign-in requirements each hour, is escorted from place to place, and does not perform normal duties, the restriction is likely tantamount to confinement.

In addition to the day for day sentence credit, a soldier will receive additional credit for pretrial restraint which violates R.C.M. 305 or Article 13, UCMJ. R.C.M. 305 is violated when pretrial confinement or restriction tantamount to confinement is served as a result of an abuse of discretion or in violation of the procedural requirements of R.C.M. 305. Procedural requirements include providing military counsel to a confinee upon request, a commander's properly applying the standard for restraint and documenting the decision in a memorandum. R.C.M. 305(j)(2) and (k). Further, imposing restriction tantamount to confinement may result in the soldier receiving day for day credit for the restriction tantamount to confinement, plus an additional day for day credit for failing to follow the procedural rules for confinement.

A soldier will also receive credit for pretrial restraint which violates Article 13, UCMJ, which prohibits punishment prior to trial. When the conditions of pretrial restraint do not serve a legitimate, nonpunitive purpose, the restraint will be found to be punishment. Specifically prohibited are wear of a special uniform, punitive labor, duty hours, or training. R.C.M. 304(f).

7. Conclusion. A soldier pending charges should ordinarily continue performing normal duties in the unit while awaiting trial. If specific circumstances require pretrial restraint, the commander has ample tools available to meet the circumstances. If a soldier is

put in pretrial confinement or under restriction tantamount to confinement, he or she will receive day for day credit on their sentence. If restraint is imposed in violation of certain procedural rules, or as punishment, the soldier will receive additional credit toward the sentence.

B. Nonjudicial Punishment Under Article 15, UCMJ (see Chapter 4).

C. Preferring Charges

Any person subject to the Uniform Code of Military Justice may prefer charges; normally, however, the unit commander prefers charges. A person subject to the Uniform Code of Military Justice "cannot be ordered to prefer charges to which he is unable truthfully to make the required oath on his own responsibility." Thus, a superior commander may not order a subordinate to prefer charges in a particular case. If a superior authority directs that charges be preferred, that superior authority becomes the accuser and, as explained later, is barred from convening a court-martial to try the charges. When a superior authority has only an official interest in a case, he or she ordinarily will transmit the available information about the case to an officer of the command "for preliminary inquiry and report, including, if appropriate in the interest of justice and discipline, the preferring of any charges which appear to you to be sustained by the expected evidence."

D. Summary Court-Martial

1. Function. The summary court-martial is the lowest level trial court in the military legal system. A summary court-martial is designed for disposition of minor offenses under simple procedures. It is composed of one commissioned officer. The law specifies no particular grade for a summary court officer, and the powers are the same regardless of the individual's grade. Ordinarily, the summary court officer is a senior captain or a field grade officer.

A summary court-martial is normally convened by a battalion commander. It may also be convened by anyone having the authority to convene a special or general court-martial. The summary court officer is detailed by personal direction of the convening authority.

A summary court-martial may try only enlisted soldiers for any non-capital offense punishable under the Uniform Code of Military Justice; that is, for any

offense for which the punishment is something less than death. The summary court-martial, however, should be limited to relatively minor military offenses and often is used after an accused has been offered and refused nonjudicial punishment for the offense.

A summary court-martial may not try an accused over his or her objection. Prior to trial, an accused should indicate on the summary court form in writing an acceptance of disciplinary action under summary court-martial. If the accused objects to trial by summary court-martial, the summary court officer will note the objection and return the charge sheet to the convening authority for disposition. If the accused consents to trial by summary court-martial, the summary court officer will proceed with the trial.

The punishment powers of the summary court-martial are outlined in the chart on page 1-22. A summary court-martial may only confine enlisted soldiers who are serving in the grade of E-4 or below.

In a trial by summary court-martial, an accused is not entitled to be represented by military counsel. If the accused desires to be represented by a civilian attorney at no expense to the Government, or if the accused has secured the services of a reasonably available individual military counsel, the summary court officer should allow such counsel to be present.

2. Mechanics of Referral. Charges are referred to summary court-martial by the convening authority. This is accomplished by completing Section V (Referral; Service of Charges) on page 2 of the charge sheet (DD Form 458). Completion of Section V is particularly important if charges are returned to the summary court-martial convening authority by a superior command with instructions to handle the matter at the lowest level. Even if the case was referred to a higher court and subsequently withdrawn, the summary court-martial convening authority must actually refer the case to a summary court-martial by completing Section V.

3. Summary Court-Martial Procedure. Trial by summary court-martial is conducted according to the procedure outlined in R.C.M. 1301-1306 of the Manual for Courts-Martial. This has been incorporated into DA Pam 27-7, which also provides a script that should be used if an accused pleads guilty to ensure that the accused understands the meaning and effect of the plea. The Military Rules of Evidence and the standard of proof of

beyond a reasonable doubt do apply to summary courts-martial.

4. Review. At the conclusion of a trial by summary court-martial, the record of trial is forwarded to the convening authority for review. Following this initial review and action by the convening authority, the summary court-martial record is forwarded to the staff judge advocate at the supervisory general court-martial jurisdiction, usually division level, for a further review.

E. Special Court-Martial (Non-BCD)

1. Functions. The special court-martial is the intermediate court in our system. It is normally convened by a brigade commander. It has more sentencing power than the summary court-martial, but less than the general court-martial. Unlike the Article 15 and summary court-martial, an accused may not turn down a special or higher court-martial.

The punishment powers of the non-BCD special court-martial are outlined on page 1-22. A special court-martial may not confine an officer.

The membership of a non-BCD special court-martial may take any one of three different forms. It may consist of (1) at least three members; (2) at least three members and a military judge; or (3) solely of a military judge if the accused so requests. Special courts-martial are not presently tried without military judges. In some instances an accused's request for trial by military judge alone may be denied by the military judge, but special courts-martial are tried by military judge alone in the vast majority of cases when requested. If an enlisted accused requests that the court have enlisted membership, at least one-third of the court members must be enlisted soldiers.

The military judge of a special court-martial is detailed by the U.S. Army Trial Judiciary. AR 27-10, chapter 8, covers the detailing of military judges and their administrative and logistical support.

Trial and defense counsel are detailed for each special court-martial. The trial counsel need not be a lawyer; however, the accused has a right to representation by counsel who is a lawyer and certified by The Judge Advocate General. As a matter of practice, both counsel are lawyers. The administrative task of making counsel available is generally handled through

the offices of the responsible staff judge advocate and senior defense counsel.

A special court-martial may try anyone subject to the Uniform Code of Military Justice for any non-capital offense made punishable by the Uniform Code of Military Justice; that is, for any offense for which the maximum punishment is less than death. Special rules apply to referral of capital offenses to a special court-martial. R.C.M. 201(f)

Charges are referred for trial by a special court-martial by completing the referral portion of Section V on page 2 of the charge sheet, as in the summary court-martial described above.

2. Procedure for the Special Court-Martial. Ordinarily, a military judge presides over the special court-martial. In the rare event a judge is unavailable, the senior officer member present presides as president.

F. "BCD" Special Court-Martial

1. Distinctive Features of a "BCD" Special Court-Martial. The "BCD" special court-martial is basically the same type of court as the special court-martial outlined above except that this court-martial has the power to impose a bad conduct discharge as punishment. There are certain requirements which must be met before such punishment may be imposed.

In order for a special court-martial to have the authority to impose a BCD, a qualified defense counsel and a military judge must be detailed (unless a military judge could not be detailed because of physical conditions or military exigencies), and a verbatim record must be made. Additionally, the general court-martial convening authority must convene a BCD special court-martial. In practice, all Army special courts-martial will have a military judge detailed to them.

2. "BCD" Special as an Option. The BCD special court-martial option provides a forum for those cases where a convening authority deems a punitive discharge warranted but does not feel that the charges are serious enough to deserve more than six months confinement. Where the discharge is warranted and the case is referred to a special rather than general court, the effort that would have been expended by the Article 32 investigation process described below is saved.

G. General Court-Martial

1. Function. The general court-martial is the highest level trial court in the military legal system and must be convened by a general court-martial convening authority after receiving the formal pretrial advice of the staff judge advocate. This court-martial tries military personnel for the most serious types of crimes.

The punishment powers of the court are limited only by the maximum punishments for each offense found in Part IV of the Manual for Courts-Martial. A general court-martial is the only court that can sentence an officer to confinement or a punitive discharge.

The general court-martial may take either of two possible forms. It may consist of a military judge and not less than five members, or solely of a military judge, if the accused so requests. The accused may elect trial by judge alone in all cases except those which are referred to trial as capital cases. In all cases a military judge must be detailed to the court. An enlisted soldier is also entitled to at least one-third enlisted membership upon oral or written request.

Trial and defense counsel are detailed for each general court-martial. Both the detailed trial counsel and defense counsel at a general court-martial must be lawyers certified by The Judge Advocate General.

2. Article 32 Investigation. No charge may be referred to a general court-martial until a thorough and impartial investigation has been made in accordance with Article 32, UCMJ. The officer appointed to conduct this investigation should be a field grade officer or an officer with legal training and experience. Many commanders appoint line officers in all cases except the most complex in order to educate young officers in the procedures of our military justice system. The purposes of the investigation are to inquire into the truth of the matters set forth in the charge sheet, to determine the correctness of the form of the charges, and to secure information upon which to determine the proper disposition of the case. The Article 32 investigating officer performs a judicial function and must obtain legal advice from a source not involved in prosecution or defense functions.

The investigation will be conducted with the accused present and represented by a defense counsel. After the investigation, a report of investigation will

be made to the officer directing the investigation. The recommendations of the Article 32 investigating officer are advisory only. The Article 32 investigation is discussed more fully in Part II of this chapter.

H. Dismissing Charges

Charges should be dismissed whenever the preliminary investigation reveals that the charges are trivial or unfounded. They should also be dismissed when no further action is deemed warranted; for example, if administrative separation is more appropriate, the charges should be dismissed. Dismissal of charges is within command discretion and if such dismissal is later deemed inappropriate, the charges may be restored.

I. Discharge In Lieu of Court-Martial (Chapter 10)

1. General. Administrative separations are important tools for dealing with minor offenses. Most separations are accomplished before charges are ever preferred against a soldier. One separation, the Chapter 10, is especially designed to operate after charges are preferred, but before action by the convening authority.

2. Discharge in Lieu of Court-Martial. AR 635-200, chapter 10, provides that an individual who is charged with an offense or offenses punishable by a bad conduct discharge or dishonorable discharge may submit a request for discharge in lieu of trial by court-martial. The general court-martial convening authority is the approval and disapproval authority for these requests. A single exception allows delegation of approval authority to the special court-martial convening authority in limited cases.

The request is initiated by the accused and is forwarded through channels, with intermediate commanders recommending approval or disapproval. If approval is recommended, the type of discharge also is recommended. A discharge under other than honorable conditions normally is issued, but either an honorable or general discharge is also authorized. Several items ordinarily accompany the form; the individual's unit commander is responsible for aiding the accused in obtaining this information. For example, the request should include a copy of the court-martial charge sheet (DD Form 458), a medical report, all reports of investigation, a statement as to the accused's mental responsibility (often a psychiatric evaluation), and the recommendations of subordinate commanders.

This administrative option must not be used indiscriminately. In the words of the regulation:

> Commanders . . . must be selective in approving of requests for discharges in lieu of trial by courts-martial. The discharge authority should not be used when the nature, gravity and circumstances surrounding an offense require a punitive discharge and confinement. Nor should it be used when the facts do not establish a serious offense, even though the punishment, under the Uniform Code of Military Justice, may include a bad conduct or dishonorable discharge. Consideration should be given to the soldier's potential for rehabilitation and his or her entire record should be reviewed before taking action. . . . Use of this discharge authority is encouraged when the commander determines that the offense is sufficiently serious to warrant separation from the Service and the member has no rehabilitation potential. (AR 635-200, para. 10-4)

J. Pretrial Agreements with the Accused

1. Definition. Negotiated pleas are an integral part of the military justice system. A negotiated plea is an agreement between the accused and the convening authority to the effect that the accused will plead guilty in exchange for some favorable action by the convening authority--generally a promise to limit an approved sentence.

2. Advantages. A commander may question why to agree to anything if the chances are good that the Government will prevail. One obvious advantage is that a plea of guilty results in saving time and personnel involved in processing charges. Also, there are specific considerations in some trials, such as the fact that a distant witness will not have to appear at trial. Thus, economy results from such an agreement. The chance for reversible error in a guilty plea case is considerably less than it is in a contested case.

3. The Rights of the Accused. An accused's guilty pleas must be entirely voluntary. Because of the possibility of abuse, it is essential that the accused's rights are fully protected when entering into a pretrial agreement. The agreement is written so that the court and the reviewing authorities know exactly what was

agreed upon. In addition, because the agreement involves the rights and prerogatives of both the accused and the convening authority, both individuals must personally sign the agreement.

4. Illegal Actions. An accused may not be forced to plead guilty to any specification. For example, it is illegal for a convening authority to prefer a number of multiplicious charges and then drop some of them in exchange for a plea of guilty. Only the convening authority can enter into a pretrial agreement with the accused. Subordinate commanders must avoid "promises" or "deals" that could be construed to bind the convening authority in some sort of pretrial agreement.

5. Permissible Agreements. In exchange for a plea of guilty by the accused, the convening authority will often agree to (a) reduce the offense charged to a lesser included offense; (b) withdraw certain specifications; or (c) agree to approve only a particular sentence. If the convening authority agrees to approve a particular sentence, such as confinement for two months, the accused gets the advantage of the agreed-upon sentence or the sentence of the court, whichever is less. Thus, if the court imposes a sentence of three months, the accused is confined for only two months because of the agreement. If, on the other hand, the court imposes a sentence of only one month, the accused is confined for one month because he or she gets the advantage of whichever sentence is less.

6. Criticism. Critics generally object to plea bargaining for two reasons: (1) it forces innocent people to plead guilty to offenses they did not commit; and (2) serious criminals get off with light sentences. In the military, a service member must admit under oath every element of the offense before the military judge will accept his or her guilty plea. This process is called the providence inquiry. Because of the "providence" inquiry, it is virtually impossible for an accused to admit to a crime he or she did not commit. To prevent agreeing to a light sentence for a serious criminal, convening authorities should approve only those sentence limitations that are just and appropriate under the circumstances. Your legal advisor will assist you in making this determination.

PART II - COMMANDER'S DUTIES

Introduction

Upon receiving a charge sheet with its allied papers, a commander must examine the file and determine a proper course of action. If the commander decides to refer a case to trial, the commander must perform the duties described below.

A. Ensure There Is a Case

1. Ensure That Charges Allege Offenses. One of a commander's most irritating experiences is to send charges to trial only to have the military judge dismiss the case for failure of the specification to state an offense. The result is that the soldier who is a disciplinary problem will return to the unit. The responsibility for properly alleging an offense rests at the company level. Have your trial counsel check all specifications prior to preferral.

If all elements of the offense are not implied or specifically alleged in the specification, the specification is deficient and subject to dismissal by the military judge. Even if the military judge does not dismiss the specification, findings of guilty to specifications that do not allege an offense will be reversed on appeal. Failure to allege an offense is not remedied by a plea of guilty or proof of guilt beyond a reasonable doubt, nor is it waived by a failure to object. Careful examination of the specification before trial prevents this error and permits corrective action.

Part IV of the Manual for Courts-Martial contains a description of the various offenses under the Uniform Code of Military Justice. Each description also includes a discussion of the proof required for a conviction. The elements of the offense are those facts that the Government must prove beyond a reasonable doubt.

The practice of charging several separate offenses from what is basically a single transaction is called multiplicious charging and is prohibited. For example, if a soldier enters a billet at night and steals three items from someone's locker, charge the soldier with one larceny of three items, not three separate larcenies. Multiplicity is a difficult area of the law and the trial counsel should review all charges prior to preferral to prevent multiplicious charging.

Also avoid duplicity, that is, alleging more than one offense in a single specification. If a soldier assaults Jones at 1500 and at 1530 assaults Smith, he has committed two separate offenses and should be charged with two different specifications of assault. Again, if there is doubt as to what to charge, consult your trial counsel.

2. Ensure Thorough Investigation. Trial results are based upon evidence admitted at trial. Without enough evidence, there is no conviction. Too often a case will seem to fit together immediately based upon the circumstantial evidence of the moment or the commander's close proximity to the situation. It is natural to suspect that a soldier who has been a disciplinary problem is the one who committed a particular offense. It is even more inviting to assume that this soldier can be convicted of that offense. In fact, there must be admissible evidence to support each of the allegations in the specification.

At trial each element of an offense must be established by competent evidence beyond a reasonable doubt. Many proof problems concern witnesses. A witness who is not available or not credible is of little use. A convening authority should inquire of the S-1 or legal specialist as to the nature and whereabouts of the witnesses. It is also important to ensure that key witnesses do not rotate out of the unit or leave the Army prior to trial. Immediately notify the trial counsel of witnesses who may be unavailable for trial because of separation from the unit so they may legally preserve the evidence. The law requires the presence of material witnesses when requested by an accused, so potential defense witnesses should also be identified and their evidence preserved. If a material defense witness was properly requested but not produced at trial, the case is subject to abatement or dismissal.

Although an investigation must be thorough, it is not necessary for a commander to await the results of a CID laboratory analysis before forwarding the charge sheet. If a soldier has been found in possession of marijuana and the company commander desires to charge the soldier with a violation of Article 112a, UCMJ, the commander should process the charge sheet and send it forward even though the lab analysis is not completed. The notion that one must await the lab analysis is common in the Army and superior commanders should make their subordinates aware that there is no such requirement. Of course, the lab analysis frequently is

required for proof of the offense at trial, but this is not a reason to delay processing the charge sheet.

Command emphasis is required for expeditious and accurate processing of charges. Military Police and CID Reports of Investigation, if available, should be forwarded with the charges. If these investigative reports are not completed when the company commander is ready to forward the charges, forward the charges with a statement saying that the reports will follow when they are available. Initial and interim reports, as well as the underlying witness statements, should accompany the charge sheet. Under no circumstances should a commander delay the forwarding of charges until completion of the final MP or CID Report.

B. Disposition of Charges

1. Referral to Trial. Where trial by court-martial is warranted because of the accused's prior record, the seriousness of the offense, and the needs of justice and discipline, the convening authority may dispose of the charge by referring it for trial by court-martial. The referral of a case to trial is accomplished by an appropriate endorsement on page 2 of the charge sheet, authenticated by the signature of an adjutant under the command line of the convening authority.

The determination to refer a case to trial is not governed by any hard and fast rules. Each accused's case must be separately studied, and disposition made on an individual basis. The application of policies requiring that the cases of all persons committing certain offenses be referred for trial to a particular type of court is forbidden. The determination to refer a case to trial must be based on probable cause that an offense was committed and the accused did it. The convening authority must personally make the decision to refer a case to trial; delegation of this decision making authority is not allowed.

2. Considerations Affecting the Decision. In deciding what options are appropriate for disposition of alleged misconduct, a commander must consider several factors. The Manual for Courts-Martial mandates referral to the lowest court-martial which can adjudge an appropriate punishment.

In determining which court is the lowest court-martial which can adjudge an appropriate punishment, consult the Maximum Punishments Chart in Appendix 12 of

the Manual for Courts-Martial. It lists the maximum punishments for each offense. A quick look at this table will indicate that a violation of Article 121, UCMJ, larceny, is more serious than a three-day AWOL. The amount of punishment is one factor that the convening authority should consider.

It is also necessary to understand the jurisdictional limitation of the court to which a case is referred. For example, a case which warrants referral to a court that can confine an officer should not be referred to a special court-martial, which cannot confine an officer. Court-martial jurisdictional punishment limitations are set out on page 1-22.

The commander must carefully analyze the nature of the offense and must treat the offense in a manner that ensures that the policies described above are implemented; a summary court-martial is not appropriate for a serious civilian-type offense, nor is a BCD special court-martial appropriate for a minor military-type offense. Consistent with the needs of discipline and justice, there should be consistency in military justice matters.

A commander should analyze the offense to determine if an individual victim is involved, as in an assault, or if the crime has no individual victim, such as AWOL. Also, a commander should look to see what injury or threat, if any, was inflicted upon the victim. An assault that results from an argument in the NCO Club in which the argument was initiated by the victim is perhaps not as serious as an assault where the victim was minding his or her own business and was assaulted for no reason at all. Whether a commander administers equal and effective justice to the unit depends in large measure upon how well the commander comes to a reasoned decision based on proper analysis. A commander who sends a simple military disorder to a general court-martial because the accused is a chronic troublemaker but disposes of a serious aggravated assault by special court-martial creates an impression that military justice is not fairly administered.

In deciding upon an action or a recommendation, a commander should take into account the character and prior service of the accused. A number of the soldiers who commit offenses are very young and on their own for the first time. Many still have a good deal of maturing to do. Thus, in some cases, a 30-year-old who becomes involved in the black market on his third tour to Korea should be dealt with more severely than an 18-year-old

who had never left home before being assigned to Korea. In other cases, an older soldier with a long record of good service may merit a less severe disposition.

In addition to the soldier's age, a commander should look into the accused's military and civilian history. If a commander pursues a policy of giving everyone the "max," that commander's military justice system will have no flexibility. Soldiers who have never been in trouble before may become a permanent problem to the command if they do not feel that they were dealt with fairly by the system. Thus, it generally is unwise to impose the "max" under Article 15, UCMJ, upon a soldier who has committed his first offense by failing to report to a formation. The offender's prior military and civilian record is, of course, only one of a number of factors that the commander must consider.

An offender's mental state is also a matter to consider. This may include mental disease, intoxication, or merely low intelligence. A commander, upon examining a file, may discover that a chronic AWOL offender has a GT score of 80 and, upon interviewing the individual, may find that the soldier just does not understand the responsibilities to the unit. If there is reason to believe that an individual is not mentally responsible, a sanity board should be convened under the provisions of R.C.M. 706 of the Manual for Courts-Martial.

A number of environmental factors may have influenced the actions of an accused. Before referring a case to trial, the convening authority should inquire into any problems the soldier has. Perhaps the accused stole a small amount of money because of family financial problems. While a "personal history" is often included with the allied papers, it is sometimes incomplete and inaccurate. The convening authority should carefully review the personal history and make an additional inquiry into the soldier's background if warranted.

The convening authority should consider any rehabilitation the soldier demonstrates. In the case of a chronic offender with no hope of rehabilitation, it may be appropriate to refer the case to a court-martial that can adjudge a punitive discharge. If the soldier has performed well since the commission of the offense and seems to have rehabilitation potential, a referral to special court-martial might be appropriate.

In addition to considering the nature of the offense and the background of the offender, a commander should consider a number of command factors in disposing of a case. The recommendations of subordinates should be given due weight. The subordinates are closest to the situation and most likely know the facts. Generally, commanders rely greatly upon recommendations of their subordinates. As with everything else in military justice, however, such reliance should be tempered by caution. In addition to being closer to the facts, subordinates are also plagued by having troublemakers in their units. A court-martial may just be an easy way to get rid of an unwanted soldier.

Consider the previous disposition of similar offenses within the same command. The administration of justice should be even-handed. If one soldier is given an Article 15 for an offense and another soldier is given a special court-martial for the same offense under the same circumstances, soldiers may perceive the justice system within a command as unfair.

A commander should determine whether or not an offense is a product of ineptness or unsuitability. If this is the case, perhaps an administrative separation is the proper course of action. Consider also whether the individual can continue to perform in the Army or whether separation is appropriate. If a separation is appropriate, the next inquiry is whether a punitive or administrative separation is warranted.

Another consideration is what impact, if any, the offense under consideration has had on unit morale. A commander may be confronted with an 18-year-old accused of low intelligence who has written several bad checks at the very time that the bad check rate of the command is higher than it has ever been. A commander should consider all of the factors involved and avoid the temptation to jump immediately to the discipline and morale of the unit as the primary reason for a decision to court-martial the accused.

3. Alternative Dispositions. Upon receipt of a charge sheet and allied papers, a battalion or brigade commander has three basic choices in disposing of the charges:

a. The commander may return the charges to the subordinate commander for whatever action the subordinate deems appropriate. This action would follow in a situation where the battalion or brigade commander did not feel the offense was as serious as did the

subordinate commander. Remember that the higher commander cannot direct the lower commander to take a particular action, e.g., give an Article 15.

b. The battalion or brigade commander may dispose of the charges at his or her own level. A commander who pursues this course should review the options outlined in this chapter and select the one most appropriate for disposition of the charges.

c. The commander may feel that his or her power is inadequate to handle the case. If so, the commander must forward the case to a superior authority whose judicial powers are greater. For example, if a special court-martial convening authority believes that a punitive discharge is warranted, he must forward the charges to a general court-martial convening authority, the only authority who can convene a "BCD" special or a general court-martial.

C. Article 32 Investigating Officer

1. Before Referral to General Court-Martial. An Article 32 investigation, or defense waiver thereof, is required before any charge may be referred to a general court-martial. Any convening authority may appoint an Article 32 investigating officer, but in practice it is the special court-martial convening authority who normally performs this duty.

2. Functions and Duties. The investigating officer's functions are: (1) to make a thorough and impartial investigation into the truth of the matters; (2) to consider the correctness and the form of the charges; and (3) to recommend a proper disposition of the charges in the interest of justice and discipline.

The duties of an Article 32 investigating officer should take precedence over other military duties. Officers detailed to perform these duties must be familiar with the contents of DA Pam 27-17, Article 32, UCMJ, and R.C.M. 405, Manual for Courts-Martial. In preparing for and conducting the investigation, the investigating officer must bear in mind that he or she is performing a judicial function. The investigating officer must be impartial in appearance and in actuality.

3. Legal Advice. The Article 32 investigating officer should seek legal advice from an impartial judge advocate, who is assigned by the staff judge advocate to perform this function. This judge advocate officer

should be consulted prior to the investigation and whenever advice is needed thereafter. The investigating officer must not rely upon the trial or defense counsel for legal advice. The investigating officer must make his own conclusions and recommendations.

The accused may be represented at the Article 32 investigation by (1) a detailed military lawyer, (2) a military lawyer of the accused's own selection if that counsel is reasonably available, or (3) a civilian lawyer provided by the accused at no expense to the Government.

Counsel may also be detailed to represent the Government at the Article 32 investigation. Such counsel represents a party to the investigation just as the defense counsel and should not be relied upon by the investigating officer for legal advice. Remember, the investigating officer should obtain legal advice from a judge advocate who does not represent either party.

4. Procedure. Generally, the testimony of the witnesses given at the investigation is summarized by a legal specialist. In certain instances an accused may be entitled to the presence of live witnesses in lieu of sworn statements in the file. The investigating officer should have the services of a clerk to summarize the substance of what the witnesses say. A verbatim record is not required. In certain cases, however, the officer appointing the Article 32 investigating officer may desire to have the entire proceedings tape-recorded or reported verbatim by a court reporter. Where the proceedings are taped, great care should be taken to safeguard the tapes until after the accused's trial. In addition to hearing witnesses, the investigating officer will examine any documentary evidence in the case.

The Article 32 investigating officer considers the evidence from both sides and makes recommendations based upon that evidence. The conclusions and recommendations of the Article 32 investigating officer along with a report of investigation and attached exhibits are submitted on DD Form 457 to the officer who directed the investigation. This officer is free to accept or reject the recommendations; they are advisory only.

D. Appointment of Court Members

1. Basic Policies. Some commanders regard court-martial duty as an unnecessary burden. They may seek to avoid this important duty or select members whose absence will least disrupt unit operations. Such

members are normally those least useful to the command. A commander can make no greater mistake than to disregard the primary policy for selection of members, that is, those with the best qualifications. Appoint as court members those who are best qualified by reason of age, education, training, experience, length of service, and judicial temperament. Note that rank is not a permissible qualification. This selection is made personally by the convening authority. As a general rule, a convening authority will avoid the appearance of "packing" the court-martial if he or she selects court members with a wide variety of ranks, ages, and job positions.

Certain individuals may not serve as court members. For example, an accuser (one who prefers charges), an investigating officer, or one who has acted as counsel for either side in the case. In addition, AR 27-10, chap. 7 prohibits chaplains and inspectors general from serving as court members, and generally precludes the selection of officers in medical fields.

2. Other Considerations. Attempt to appoint officers from another unit who are unfamiliar with the accused and the offense. The accused is entitled to an impartial court. To avoid the appearance of evil, officers who deal closely with disciplinary matters within the command, such as military police, should not normally be selected as court members. For these same reasons it is unwise for a summary court-martial convening authority to appoint his or her executive officer as the summary court officer. Arrangements should be made to appoint an impartial officer from another battalion. Upon request, an enlisted accused is entitled to have at least one-third of the membership of the court composed of enlisted soldiers, from a different company-sized unit than his or her own.

The selection of court members by convening authorities is the focus of much criticism by civilians, and every effort should be made to avoid any charge of unlawful command influence in the selection of court members (see Chapter 3).

E. Pretrial Requests of the Convening Authority

1. Severance. A request for severance may arise where two or more accused are being tried together. In such a case, one accused may ask to be tried separately by requesting a severance.

An accused may seek a pretrial severance for several reasons. For example, the evidence against one co-accused may be more prejudicial. An accused may also want a separate trial in a case where the defense desires to use the testimony of the co-accused. In such a case the accused does not want the defense witnesses being judged by the same court hearing his or her case. If one accused is also charged with an unrelated offense, the co-accused may desire a separate trial.

The convening authority should carefully consider the reasons set forth by the accused for a severance and grant the request on a showing of good cause.

2. Change of Venue. A request for a change of venue is a request to move the location of the trial. Once a case is before a military judge, the judge decides such requests. Initially, however, the trial site is selected by the convening authority. The reasons an accused might make such a request include an allegation that the accused cannot get a fair trial at the present location of the trial due to local publicity. The burden rests with the accused to convince the convening authority that local prejudice exists, but a convening authority should seek the advice of a judge advocate before making a determination.

3. Amendment of the Specification. Occasionally a case will work its way through the entire pretrial process and still contain a defective specification. In this event the trial counsel may request to amend the specification to correct the defect. If trial counsel recommends dismissal or amendment of a specification due to insufficient evidence, the convening authority should normally accede to this request. If the specification will mislead the accused or fail to protect against a second trial for the same offense, the request to amend should be granted.

4. Immunity. Witnesses, whose testimony may incriminate themselves, have a right to refuse to testify; a grant of immunity, however, can overcome this right. Once immunity is properly granted, it is possible to order a witness to testify. Only the general court-martial convening authority has the power to grant immunity, although there are circumstances where the Department of Justice must approve such a grant.

5. Psychiatric Examination. In some cases it is desirable to have the accused examined by a psychiatrist to determine if he or she was mentally responsible at

the time of the act or at time of trial. The law does not permit the conviction of one who was not mentally responsible at the time of the act or at time of trial. If there is any question as to the mental status of the accused at the time of the commission of the offense or at the time of trial, the convening authority should arrange for a psychiatric examination of the accused.

Either counsel or some other appropriate party may bring the question of an accused's mental status to the attention of the convening authority, e.g., the Article 32 investigating officer. The board is composed of physicians and conducts an inquiry into the mental condition of the accused. At least one member of the board should be a psychiatrist. Any request for such a board should be coordinated with the judge advocate serving the command.

F. Speedy Trial

1. In General. After an offense occurs, effective law enforcement and discipline require that a timely inquiry be made into the incident by the company commander while the facts are fresh and any appropriate charges be brought and expeditiously resolved. Delay in investigation and disposition of offenses undercuts morale and discipline. Also, an accused soldier has a right to a speedy trial. If the government violates an accused's right to a speedy trial, the charges may be dismissed.

2. Speedy Trial Rules. There are several rules which define an accused's right to a speedy trial. Under R.C.M. 707 all accused soldiers must be brought to trial within 120 days after the earlier of imposition of restraint, preferral of charges, or entry on active duty under R.C.M. 204. Prior to referral of the charges, the convening authority may grant delays requested in advance by either the government or defense. Prior to granting a delay, the opposing party must be given an opportunity to respond. The convening authority should reduce to writing any decision to grant a delay, the supporting reasons, and the applicable dates. Any period of an approved delay may be excluded from the 120 day period.

Although R.C.M. 707 prescribes a 120-day rule, Article 10, UCMJ, has a more stringent rule if an accused is in pretrial confinement, arrest, or restriction tantamount to confinement. The government has no grace period. From the first day of confinement

or arrest, it must exercise reasonable diligence in bringing the charges to trial.

3. Avoiding Speedy Trial Problems. As a general rule, the commander should seek to have cases resolved within 90 days of the day of an incident, and even more quickly if circumstances permit. Immediately upon learning of an incident, the company commander should begin the preliminary inquiry called for by R.C.M. 303. As appropriate, law enforcement assistance should be requested. Early coordination should be made with the unit's supporting judge advocate. If pretrial restraint is necessary, the commander should coordinate with the judge advocate prior to imposing pretrial confinement or as soon as practicable after imposing arrest or restriction. Any witnesses needed for trial must be identified and put on hold. Case files should be handcarried. Necessary charges should be forwarded without waiting for final MP or CID reports. Timely action from incident to final disposition will best serve law enforcement, discipline, and the right to a speedy trial.

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CHAPTER 2

OPTIONS AND DUTIES OF THE COMMANDER

TEACHING OUTLINE

I. INTRODUCTION.

An incident occurs, now what?

Key terms: prefer - to swear out charges; any person subject to the Code may prefer charges.

refer - to order charges tried by a specified court-martial; convening authorities refer charges.

II. PROCESS AND OPTIONS.

A. Investigate.

1. Preliminary (informal) investigation. R.C.M. 303

"Upon receipt of information that a member of the command is accused or suspected of committing an offense . . . triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses."

2. Distinguish from Article 32, UCMJ; R.C.M. 405.

"[N]o charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made in

substantial compliance with this rule." R.C.M. 405(a).

a. May be directed by any court-martial convening authority, but usually directed by Special Court-Martial Convening Authority.

b. Normally, the investigating officer should be a field grade officer.

c. Accused and defense counsel entitled to be present. Trial counsel may attend.

3. **BOTTOM LINE.** Get the facts. Company commander should do most investigations, but it's okay to do 15-6 investigation if not sure a criminal offense has been committed.

B. **Consider Alternatives.** R.C.M. 306.

1. No action/dismissal.

2. Nonpunitive action, e.g., reprimand, bar to reenlistment, administrative separation.

3. Nonjudicial punishment. Summarized, Company-grade, Field-grade.

4. Judicial action. Summary, Special, BCD Special, General Court-Martial.

C. **Pretrial Restraint.** R.C.M. 304.

1. Types of pretrial restraint. R.C.M. 304(a).

   a. Conditions on liberty.

   b. Restriction.

   c. Arrest.

   d. Pretrial confinement.

   e. **BOTTOM LINE.** Restriction starts 120 day speedy trial clock. Pretrial confinement, arrest or restriction tantamount to confinement start a more stringent clock.

2. Who may order pretrial restraint? R.C.M. 304(b).

   a. Of officers - commander to whose authority they are subject. May not be delegated.

   b. Of enlisted soldiers - any commissioned officer. May be delegated to NCO.

D. **Credit for Pretrial Restraint.**

1. Accused in pretrial confinement receives day for day credit against sentence to confinement.

2. Accused also receives day for day credit against sentence to confinement for restriction "tantamount to confinement,"

e.g., sign in every hour, escort to leave room, etc.

E. **Speedy Trial Discussion.**

1. "120-Day Rule." R.C.M. 707.

a. The accused shall be brought to trial within 120 days after the earlier of:

(1) preferral of charges, or

(2) the imposition of restriction, arrest or pretrial confinement.

Note: Conditions on liberty do not start 120-day clock.

(3) Entry on active duty under R.C.M. 204 (Reservists).

b. Defense delays are excludable.

c. Request and approval of delays must be in writing and approved by convening authority (pre-referral) or the military judge (post-referral).

d. Remedy - dismissal of charges.

2. Pretrial confinement, arrest, or restriction tantamount to confinement require government to bring charges to trial in a reasonably diligent manner. Can have a speedy trial violation in less than 120 days. Remedy is dismissal.

F. **Request for Discharge in Lieu of Court-Martial.** Chapter 10, AR 635-200.

1. Requirements.

a. Offense must carry a punitive discharge as a possible punishment or,

b. Combination of charges would permit a BCD under R.C.M. 1003(d) and case is referred to a court authorized to adjudge a punitive discharge.

2. Only a GCM convening authority may approve or disapprove.

3. Type of discharge - usually Under Other than Honorable Conditions.

4. When to recommend/accept?: Unlikely court will give much of a sentence; saves child victims from testifying; precludes massive outlay of resources; no negative effect on command disciplinary climate.

G. **Pretrial Agreements.** R.C.M. 705.

1. Made between accused and convening authority.

2. When to accept? Answer: good sentence; saves resources; speeds process.

3. Generally limited to limitations on reduction, confinement or forfeitures.

H. **Court Personnel Selection.** R.C.M. 502, 503.

1. Members.

a. Convening authority shall detail as members those who are "best qualified . . . by reason of age, education, training, experience, length of service, and judicial temperament." Art. 25(d), UCMJ.

b. Rank is an impermissible consideration.

c. Considering race and gender are permissible if motivation is legal (proper).

2. Other Personnel.

Trial Counsel - detailed by SJA.

Defense Counsel - detailed by Senior Defense Counsel.

Military Judge - detailed by Trial Judiciary.

I. **Action on Findings and Sentence.** R.C.M. 1107.

1. Convening authority must take action on the sentence; action on the findings is discretionary. Personal to convening authority.

2. Clemency. (but consult JA first)

a. Findings - convening authority may set aside finding of guilty or change to lesser included offense.

b. Sentence - convening authority may disapprove sentence in whole or part. Cannot increase sentence.

c. Submissions by defense: must review.

d. Do not consider adverse matters outside record unless defense is notified.

3. Post-trial confinement begins on date it is adjudged. Convening authority or, if authority is delegated, trial counsel orders soldier into post-trial confinement.

4. Deferment of confinement. R.C.M. 1101(c). Convening authority must act in writing on deferment request. Soldier must show interest in release outweighs interest in confinement.

5. Excess leave.

6. Post-trial sessions--prior to initial action.

III. FINAL THOUGHT.

1. Military Justice Goals

2. Swift investigation

3. Fair and proper action.

4. Each case individually considered in the context of a consistent disciplinary philosophy

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CHAPTER 3

UNLAWFUL COMMAND INFLUENCE

Introduction

Articles 37 and 98, UCMJ, make it unlawful for a convening authority to attempt to influence the members of a court-martial as to the outcome of the trial. This is an area where the commander must exercise a great deal of care. Unlawful command influence in any form, actual or apparent, has no place in the operation of the military justice system. The appearance or perception that an accused is not receiving a fair trial can have an adverse affect on the morale and discipline of the command as well as public confidence in the military justice system.

A. Lawful Versus Unlawful Command Influence

1. General.

Commanders generally get involved with the criminal justice system during three different stages of a case--pretrial, trial, and post-trial. In each stage commanders have many tools and powers to properly control discipline and the military justice system.

2. Pretrial Stage.

One of the commander's most important powers in the military justice system is the power to gather the facts. The commander or his staff has the power to gather facts during the commander's preliminary inquiry by interviewing witnesses, authorizing the search and seizure of evidence, and accumulating documentary evidence. The commander can obtain additional investigative assistance in serious or complex cases from law enforcement agencies or by formally appointing an investigating officer. Cases recommended for general court-martial must be investigated at an Article 32, UCMJ, pretrial investigation before the charges are referred to general court-martial. Any convening authority can appoint an investigating officer and direct an investigation. It is the investigating officer who musters all the available evidence, identifies witnesses who may not be available to testify at trial, ensures that the charges are in proper form, and makes a sound recommendation as to disposition. Selection of a well-qualified investigating officer can go a long way toward ensuring appropriate resolution of cases.

Commanders also have the power to affect the disposition of cases involving one of their subordinates. This includes the power to take any nonpunitive or punitive action authorized at their level of command or authorized at any inferior level of command. A field grade commander, for example, has the authority to administer a field grade Article 15 but may decide to impose only a company grade level of punishment. Similarly, a general court-martial convening authority has the power to refer a case to a summary or special court-martial. When taking a punitive action, the commander acts in a judicial capacity and must make an independent determination that punishment is appropriate. If a field grade commander feels that a case deserves company grade Article 15 punishment, that commander can either impose the appropriate punishment personally or send the case down to the company level commander for "appropriate disposition at that level." The field grade commander cannot send the case to the company level commander with directions to administer "a company grade Article 15" or imposition of a specific type of punishment.

Finally, a commander who feels that a case demands a more serious disposition than he or she can administer can forward the case to a higher authority with a recommendation as to disposition. An accused is entitled to have each level of command make an independent recommendation. A commander cannot have a fixed, inflexible policy regarding the level of disposition, and cannot establish guidelines "suggesting" an appropriate punishment for any category of cases. Although policy letters are not absolutely prohibited, appellate courts have strongly discouraged their use. Superior commands, however, often promulgate various policy directives. For example, a division commander may express concern over the high rate of motor vehicle violations. The expression of concern does not violate Article 37 unless it causes subordinates to surrender discretion they might have under the Uniform Code of Military Justice. A statement which expresses concern over a high motor vehicle accident rate is permissible while a directive requiring subordinates to dispose of all motor vehicle accident cases by court-martial is unlawful. Subordinate commanders must be free to make an honest, independent assessment of how each case should be handled. This assessment necessarily requires individualized treatment of each soldier's case. Allowing subordinates to make honest recommendations in no way jeopardizes the system, because superior commanders are not bound by their subordinate's recommended disposition. As long as a

superior commander acts before jeopardy attaches, which occurs when evidence is presented at trial, a case generally can be escalated from a subordinate disposition level to a higher level.

3. Trial Stage.

Once the trial begins, commanders usually are not actively involved beyond providing administrative support. Once the convening authority has fulfilled the statutory responsibility to pick the best qualified personnel to sit as court members, the convening authority should allow the system to work without attempting to manipulate the process.

The only "contact" commanders generally should have with witnesses is arranging for their presence at court. Only general court-martial convening authorities can grant immunity to witnesses. Subordinate commanders should scrupulously avoid negotiating "deals" with witnesses under circumstances that could be construed as involving a promise, express or implied, of immunity. Commanders should always contact their staff judge advocate before discussing immunity with a witness.

The most egregious incidents of unlawful command influence are those that directly affect the trial process by pressuring court members to convict (or punish) contrary to their actual conscience. Direct, overt attempts to subvert justice by putting command pressure on court members are illegal and can be charged as criminal offenses. These incidents, however, are extremely rare.

The more common problem is perceived criticism of soldiers who participate as witnesses at a court-martial. Many subordinates, naturally eager to please their superior commanders, will read more into their superior's remarks than the superior ever intended. When they do so in the area of military justice, there is often prejudicial impact. The appellate courts do not focus solely on the intentions of the commander. Unlawful command influence can result from the misperceptions of the subordinate. If subordinates reasonably misunderstand or reasonably misinterpret the superior commander's intentions and, as a result, the accused is prejudiced at trial, unlawful command influence has occurred.

Another problem in this area is one of instruction. Certain orientation courses on military justice may violate the prohibition against unlawful command

influence. For example, instruction to court members immediately before trial of an AWOL case as to the need for severe punishment in that type of case is unlawful. The only instructional or informational courses which should be given in the area of military justice are those outlined in appropriate Army regulations (see Chapter 19, AR 27-10). Talk with your servicing judge advocate about a plan for military justice training.

4. Post-Trial Stage.

After trial, the commander has the opportunity to review the results of the trial; take action to disapprove findings, and approve, suspend or reduce the adjudged sentence.

Convening authorities also have the power to request reconsideration of a military judge's legal ruling, other than a finding of not guilty, if he or she believes the ruling is erroneous. The government has the right to appeal an order or ruling of the military judge that "terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceedings." Finally, the convening authority may order a rehearing if there was a legal error in the trial that may substantially affect the findings or sentence.

Again, in the post-trial scenario, Article 37 applies and places two restrictions on the commander's authorized activity. Article 37 prohibits censuring, reprimanding, or admonishing "the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings." Commanders are also prohibited from giving unfavorable efficiency ratings for participating as a court member.

Many commanders are disturbed when they review court-martial results, especially where favorable testimony has been given on behalf of a soldier. As mentioned previously, admonishing the members or witnesses is prohibited. Post-trial criticism or lecturing will become an issue in future cases if such conduct has a "chilling effect" on the independence of court members or the willingness of witnesses to testify. Commanders should encourage their subordinates to cooperate with counsel and to make themselves available to testify on relevant matters.

In the area of military justice, Congress has attempted to balance the rights of the military accused and the power of the commander to control military justice. The Code and the Manual give commanders the tools to achieve legitimate disciplinary objectives without engaging in improper activity.

B. Convening Authority as Accuser

It is unlawful for a commander who is an accuser to convene a court-martial for the trial of that accused. An "accuser" is ordinarily the person who actually signs and swears to the charges. This is the person who completes the signature block of the accuser on page 1 of the charge sheet. Another "accuser" is the commander who directs another individual to sign and swear to the charges as the nominal accuser. Also, a convening authority who has <u>other than an official interest</u> in a case may be disqualified from convening the court because he or she is an accuser. For example, a soldier burglarizes and ransacks the house of General Jones. Clearly, General Jones has more than an official interest in the case. The proper solution is to transmit the case up to General Jones' superior.

A general court-martial convening authority or a special court-martial convening authority who is an accuser cannot lawfully convene a court. This restriction does not apply to the summary court-martial convening authority, but a commander who fits the definition of accuser is well advised to forward the case to a superior convening authority for trial by summary court-martial. A commander in the foregoing situation who is a general or special court-martial convening authority should forward the charges to a "superior competent authority" if the commander feels a trial is required. A superior competent authority would be the next superior commander in the chain of command for military justice purposes. In the event the commander develops more than an official interest after the charges are referred to trial, that commander can no longer act as convening authority and any convening authority duties must be handled by superior competent authority.

APPENDIX A

Art. 37. Unlawfully influencing action of court.

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, [sic] in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

SENIOR OFFICER LEGAL ORIENTATION

UNLAWFUL COMMAND INFLUENCE

Outline of Instruction

I. INTRODUCTION.

A. References:

1. Manual for Courts-Martial, United States, 1984 (1994 ed.) [hereinafter MCM).

2. Uniform Code of Military Justice [hereinafter UCMJ], arts. 1, 25, 37, 98.

3. Dep't of Army Reg. 27-10, Military Justice, paras. 5-9, 5-10*c* (8 Aug. 1994) [hereinafter AR 27-10].

B. Keys to understanding unlawful command influence.

1. See the commander as a judicial authority. Know that you can have both actual or apparent unlawful command influence.

2. The exercise of unlawful command influence goes beyond just commanders, *e.g.*, Chief of Staff, CSM, SJA, G-1.

3. Prevention is a responsibility shared by all commanders, judge advocates, and staff.

II. Independent Discretion Vested in Each Commander.

Each judicial authority, at every level, is vested with independent discretion, **by law**, which may not be impinged upon. There is no need to dictate dispositions to a lower-level commander.

A. Lawful Command Actions. The commander MAY:

1. Personally dispose of a case if within commander's authority or any subordinate commander's authority.

2. Send a case back to a lower-level commander for that subordinate's independent action. Superior may not make a recommendation as to disposition.

3. Send a case to a superior commander with a recommendation for disposition.

4. Withdraw subordinate authority on individual cases, types of cases, or generally.

5. Escalate a lower disposition. EXCEPTIONS:

   a. An executed Article 15 for a minor offense. It is permissible for superior commander to prefer charge for a major offense even though accused already received Art. 15 for the offense.

   b. After evidence is presented at trial, extremely limited authority to escalate disposition, *e.g.*, urgent and unforeseen military necessity.

B. Recurring mistakes:

1. Advice before the offense (Policy Letters).

   Example: Policy of GCM for soldiers with two prior convictions constitutes unlawful interference with subordinate's independent discretion.

2. Advice after the offense.

a. Improper for battalion commander to return request for Article 15 to company commander with comment, "Returned for consideration for action under Special Court-Martial with Bad Conduct Discharge." Superior learned of additional misconduct by the accused and told subordinate commander, "You may want to reconsider the Article 15 and consider setting it aside based on additional charges." Court, relying on fully developed record at trial, agreed with trial judge that subordinate "exercised his own independent discretion when he preferred charges."

III. Convening Authority as Accuser.

A. Accuser is "person who signs and swears charges, any person who directs the charges nominally be signed and sworn to by another and any person who has an interest other than an official interest in the prosecution of the accused."

1. Test is whether under the circumstances "a reasonable person would impute to [the convening authority] a personal feeling or interest in the outcome.

2. Convening authority who possesses more than an official interest must forward the charges to a superior competent authority for disposition.

B. Exceptions:

1. Violations of general regulations.

2. Article 15s.

3. Summary Courts-Martial.

C. Disqualified SPCMCA must disclose disqualification even when forwarding charges to GCMCA with recommendation for GCM.

IV. Inflexible Attitude May Limit Convening Authority's Power.

As a judicial authority, the convening authority must consider each case **individually** on its own merits.

V. Court Member Selection.

A. Article 25 Criteria. The **convening authority** chooses court members based on criteria of Article 25, UCMJ: age, education, training, experience, length of service and judicial temperament.

B. Staff Assistance.

1. Staff and subordinate assistance in compiling a list of eligible court members is permissible.

2. Commander must beware, however, of subordinate nominations not in accordance with Article 25. Example: It was improper for Division Deputy AG to develop list consisting solely of nominees who were supporters of harsh discipline.

C. Replacement of panel also requires that the convening authority use **only** Article 25 criteria. Even then, the convening authority must avoid using improper motives or creating the appearance of impropriety.

VI. No Outside Pressure.

A. Education: AR 27-10, para. 5-10*c*. "Court members . . . may never be oriented or instructed on their immediate responsibilities in court-martial proceedings except by . . . [t]he military judge. . . ."

B. Command policy in the courtroom.

Disclosure to panel hearing accused's case of terms of co-accused's pretrial agreement and result of trial creates improper convening authority influence over panel during sentence deliberation. Terms of pretrial agreement alerts panel to what convening authority deems an appropriate sentence.

C. In the deliberation room.

Improper for senior ranking court members to use rank to influence vote within the deliberation room, *e.g.*, to coerce a subordinate to vote in a particular manner.

D. Mentoring.

1. Example: The division commander's comments "were later interpreted, or misinterpreted, to reflect an intent that a commander, first sergeant, or other person from an accused's unit should not give favorable...testimony on behalf of an accused."

2. The "black letter" rule is expressed in United States v. Rogers, CM 442663 (ACMR 29 March 1983) (unpub.): "While a commander may not preclude subordinate commanders from exercising their independent judgment, he may express his opinion and provide guidance to them. The fine line between lawful command guidance and unlawful command control is determined by **whether**

the subordinate commander, though he may give consideration to the policies and wishes of his superior, **fully understands and believes that he has a realistic choice to accept or reject them."**

E. Command interference with the power of the judge.

Example: Unlawful command interference when commander placed accused into pretrial confinement in violation of trial judge's ruling. Remedy: 18 months credit ordered against accused's sentence.

VII. Witness Intimidation.

A. Direct attempts to influence witnesses.

1. Example: The chain of command briefed members of the command before trial on the "bad character" of the accused. During trial, the 1SG "ranted and raved" outside the courtroom about NCOs condoning drug use. After trial, NCOs who testified for the accused were told "that they had embarrassed" the unit. Court found unlawful command influence necessitated setting aside findings of guilt and the sentence.

2. Example: Battalion commander counselled potential defense witnesses concerning their responsibilities as NCOs: "[B]e careful who we give character references for . . . ." Two of those counselled decided not to testify on behalf of accused.

B. Indirect or unintended influence. The most difficult and dangerous areas are those of communications, perceptions, and possible effects on the trial, <u>despite</u> good intentions.

1. Example: CG addressed groups over several months on the inconsistency of recommending discharge level courts and then having leaders testify that the accused was a "good soldier" who should be retained. The message received by many was "don't testify for convicted soldiers." Accordingly, these comments unlawfully pressured court-martial members and witnesses.

2. Command policies versus military justice policies: Example: When two witnesses were relieved of drill sergeant duties immediately after testifying favorably for the accused, the hesitancy of potential witnesses to testify in a similar case was evidence of unlawful command influence.

VIII. Pretrial Punishment May Raise Unlawful Command Influence.

Mass Apprehension. Berating and humiliating suspected soldiers utilizing a mass apprehension in front of a formation found to be unlawful command influence (attempt to induce severe punishment) and unlawful punishment.

IX. Independent Discretion of Military Judge.

A. Prohibition: "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case . . . ." UCMJ, art. 37(a).

B. Efficiency Ratings: "[N]either the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge." UCMJ, art. 26(c).

C. Questioning sentences.

Example: Commander and SJA inquiries which question or seek justification for a judge's decision are prohibited (unless by an independent judicial commission).

D. Subtle pressures.

Example: Improper for DSJA to request that the senior judge telephone the magistrate to explain the seriousness of a certain pretrial confinement issue.

X. Attitude Toward Clemency.

The convening authority **may** approve or disapprove findings, and suspend or reduce sentences. As a judicial appellate authority, the convening authority has a duty to impartially review military justice actions. An inflexible attitude towards clemency necessitates a loss of command/judicial authority.

A. Accused is entitled "as a matter of right to a careful and individualized review of his sentence at the convening authority level. It is the accused's first and perhaps best opportunity to have his punishment ameliorated and to obtain the probationary suspension of his punitive discharge."

B. Examples of problem areas:

1. Division commander's letter stated that "all convicted drug dealers say the same things . . . drug peddling and drug use are the most insidious form of criminal attack on troopers . . . [s]o my answer to . . . appeals is, 'No, you are going to the Disciplinary Barracks . . . for the full term of your sentence and your punitive discharge will stand.' Drug peddlers, is that clear?" Convening authority held to

be disqualified to perform review function.

2. CG indicating that he could not understand how a battalion commander could allow a soldier to be court-martialed and then testify at trial about the soldier's good character, did not possess the requisite impartiality to perform post-trial review function.

XI. Raise Issue Immediately; remedial actions are possible:

A. Before trial.

Example: In response to 1SG's criticism that those who testify on behalf of drug offenders contravene Air Force policy, the command instructed all personnel that testifying was their duty if requested as defense witnesses and transferred the 1SG to eliminate his access to the rating process.

B. At trial.

1. Example: Automatic challenges for cause against those in the unit and no unfavorable character evidence permitted against the accused. GCMCA disqualified from taking action in case.

2. Example: Government not allowed to call any witnesses in aggravation or attack accused's credibility by opinion or reputation testimony, wide latitude in defense witnesses, accused allowed to testify what he <u>thought</u> witnesses might have said on the merits or extenuation/mitigation.

C. Post-trial.

R.C.M. 1102: Anytime before authentication or action the military judge or convening

authority respectively may direct a post-trial session to resolve any matter which affects the legal sufficiency of any findings of guilty or the sentence.

XII. CONCLUSION.

THE 10 COMMANDMENTS OF UNLAWFUL COMMAND INFLUENCE

COMMANDMENT 1: THE COMMANDER MAY NOT ORDER A SUBORDINATE TO DISPOSE OF A CASE IN A CERTAIN WAY.

COMMANDMENT 2: THE COMMANDER MUST NOT HAVE AN INFLEXIBLE POLICY ON DISPOSITION OR PUNISHMENT.

COMMANDMENT 3: THE COMMANDER, IF ACCUSER, MAY NOT REFER THE CASE.

COMMANDMENT 4: THE COMMANDER MAY NEITHER SELECT NOR REMOVE COURT MEMBERS IN ORDER TO OBTAIN A PARTICULAR RESULT IN A PARTICULAR TRIAL.

COMMANDMENT 5: NO OUTSIDE PRESSURES MAY BE PLACED ON THE JUDGE OR COURT MEMBERS TO ARRIVE AT A PARTICULAR DECISION.

COMMANDMENT 6: WITNESSES MAY NOT BE INTIMIDATED OR DISCOURAGED FROM TESTIFYING.

COMMANDMENT 7: THE COURT DECIDES PUNISHMENT. AN ACCUSED MAY NOT BE PUNISHED BEFORE TRIAL.

COMMANDMENT 8: NO PERSON MAY INVADE THE INDEPENDENT DISCRETION OF THE MILITARY JUDGE.

COMMANDMENT 9: THE COMMANDER MAY NOT HAVE AN INFLEXIBLE ATTITUDE TOWARDS CLEMENCY.

COMMANDMENT 10: IF A MISTAKE IS MADE, RAISE THE ISSUE IMMEDIATELY.

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CHAPTER 4

NONJUDICIAL PUNISHMENT

Introduction

One of the most valuable disciplinary tools available to the commander is the authority to impose nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ). In the case of United States v. Booker, 5 M.J. 238 (C.M.A. 1977), the Court of Military Appeals recognized the role of nonjudicial punishment in the military:

> We wholeheartedly express our firm belief that those exercising the command function need the disciplinary action provided for under Article 15 . . . to meet and complete their military mission.

The provisions of Article 15 are also discussed in Part V of the Manual for Courts-Martial, 1984, and Chapter 3, Army Regulation 27-10. These three sources are the primary authorities on nonjudicial punishment.

A. Applicable Policies

A commanding officer is encouraged to use nonpunitive measures to the maximum extent possible in furthering the efficiency of the command without resorting to the imposition of nonjudicial punishment. Resort to nonjudicial punishment is proper only in cases in which administrative measures are considered inadequate or inappropriate. Nonjudicial punishment may be imposed in appropriate cases to--

- Correct, educate, and reform offenders who have shown that they cannot benefit by less stringent measures;

- Preserve an offender's military record from unnecessary stigma by a court-martial conviction; and

- Further military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial (AR 27-10, para. 3-2).

Before imposing punishment under Article 15 the commander should consider all options. In reviewing these options, the commander should be aware of the ultimate impact of his action upon the soldier's record and upon the discipline of the command. He should also

consider the number of manhours required to effect his decision. When an offense has occurred, one or more of the following options may be available to the commander:

1. No Action.

2. Nonpunitive Action.

   a. Administrative Reprimand/Admonition (AR 640-10, AR 600-37).

   b. Administrative Reduction in Grade for inefficiency (AR 600-200).

   c. Extra Training.

   d. Magistrate's Court (generally traffic offenses).

   e. Administrative Separation.

3. Nonjudicial Punishment.

4. Court-Martial.

REFERENCE: MCM, Part V, paras. 1c, d; AR 27-10, paras. 3-2, 3-3.

B. Imposition Authority

1. Who May Give an Article 15?

The general rule is that any "commander" is authorized to impose punishment under Article 15. The term "commander," when speaking of Article 15 authority, refers to a "commissioned or warrant officer who, by virtue of that officer's grade and assignment, exercises primary command authority over a military organization or prescribed territorial area, that under pertinent official directives is recognized as a command" (AR 27-10, para. 3-7). Whether a unit constitutes a "command" sometimes raises questions. AR 27-10 indicates that "commands" include companies, troops, batteries, numbered units and detachments, missions, Army elements of unified commands and joint task forces, service schools, and area commands. This list is not exhaustive.

The commander's discretion to impose an Article 15 is personal and must not be hampered by any superior's "guidelines" or "policies" (AR 27-10, para. 3-4b). Although a superior commander may not tell a subordinate

when to impose an Article 15 or how much punishment should be assessed, the superior commander may:

a. Totally withhold the subordinate's imposition authority, or

b. Partially limit imposition authority regarding (1) a particular category of offenses (e.g., all larcenies), (2) a certain category of personnel (e.g., all officers), or (3) a particular case (e.g., a fight involving soldiers at a local bar).

Because the authority to impose an Article 15 is an attribute of command, a commander may not, as a general rule, delegate that authority to a subordinate. The exception to that rule is that an officer authorized to exercise general court-martial jurisdiction and any commanding general may delegate Article 15 powers to a commissioned officer actually acting as a deputy or assistant commander. A general court-martial convening authority or a commanding general may also delegate the authority to the chief of staff, provided the chief of staff is a general officer. These delegations must be in writing and may be exercised only when the delegate is senior in rank to the person being punished (AR 27-10, para. 3-7b). A commander's delegation of the authority does not prevent that commander from personally acting in any case. An appeal from punishment imposed under a delegation of power will be acted upon by the authority next superior to the officer who delegated the authority.

2. Who May Receive an Article 15?

A commander may impose nonjudicial punishment upon military members of the command. Individuals are considered to be members of the command if they are assigned to the command or affiliated with the command under conditions, either expressed or implied, which indicate that the commander of the unit is to exercise administrative or disciplinary authority over them. If there is any question as to whether an individual is within the command, written or oral orders which affect the individual's status should be examined. If the orders indicate that the soldier is attached for administration of military justice, or simply attached for administration, the individual will normally be considered to be a member of the command for purposes of Article 15. Otherwise, consider where the soldier slept, ate, was paid, performed duty, the duration of the status, and other similar factors (AR 27-10, para. 3-8a).

A soldier could be a member (for the purposes of Article 15) of several commands. For example, PFC Frank Jones, who is a member of Company A at Fort Sticks, goes on TDY to Fort Acres where he is temporarily assigned to Company B. Theoretically, he could be a member of both Company A and Company B for purposes of nonjudicial punishment.

An Article 15 may not be imposed upon an individual once military status as a member of the command has terminated. For example, once Jones returns to his parent unit (Company A), he is no longer amenable to punishment by the commander of Company B. The commander of Company B may forward reports of offenses to Company A's commander for possible Article 15 punishment (AR 27-10, para. 3-8b).

3. When is an Article 15 Appropriate?

The general rule is that an Article 15 should be offered only for minor offenses. A rule of thumb found in the Manual for Courts-Martial indicates that an offense is minor if the maximum authorized punishment for the offense does not include a dishonorable discharge or confinement for more than one year (MCM, Part V, para. 1e). That, of course, is only a guideline. The standard for determining whether the offense is minor is flexible and requires examination of the surrounding circumstances. For example, possession of cocaine is normally considered a "major" offense, but the circumstances of the possession may dictate that it is a minor offense for the purposes of an Article 15.

Occasionally, an Article 15 is given for a major offense. If this occurs, a higher level commander may still refer the case to a court-martial if he deems the Article 15 inappropriate for the magnitude of the offense. The Article 15 may then be admitted into evidence during the sentencing phase of the trial and the soldier must be given full credit for the Article 15 punishment that was imposed. This type of situation should occur only rarely. A commander should not proceed with an Article 15 if he or she is planning to court-martial the soldier for the same offense later.

REFERENCE: MCM, Part V, para. 2; AR 27-10, paras. 3-7, 3-8, 3-9.

C. Procedures in Formal Proceedings

1. Notice.

The commander who is considering the imposition of an Article 15 must give written and oral notice to the soldier (MCM, Part V, para. 4a; AR 27-10, para. 3-18a). AR 27-10 allows the notice to be given by an officer or noncommissioned officer designated by the imposing commander. The noncommissioned officer must be a SFC or above and must be senior to the individual being notified. The officer or NCO who conducts the notice portion of the proceeding does not sign in Item 2; the imposing commander must always sign the Article 15. The vehicle for providing the written notice is DA Form 2627, a copy of which is located at Appendix A on page 4-19. A boilerplate notice/advice can be found at Appendix B of AR 27-10 and at Appendix C of this text, page 4-23. Normally, the commander presents the form to the individual and orally explains the various options and rights that are available. These options and rights include the following:

a. Article 31b Rights.
b. Right to Demand Trial.
c. Right to Consult with Counsel.
d. Right to Request an Open Hearing.
e. Right to Request a Spokesperson.
f. Right to Call Witnesses.
g. Right to Appeal.

2. Rights and Rules.

The soldier is not entitled to know the type or amount of punishment that the soldier will receive if nonjudicial punishment ultimately is imposed. The soldier will be informed of the maximum punishment which may be given under Article 15, and, upon the soldier's request, the maximum punishment that could be adjudged by a court-martial upon conviction for the offense(s) (AR 27-10, para. 3-18f(2)). In addition, the soldier should be advised that the commander is not limited to the Article 15 charges if trial is demanded. This should not be a threat to add additional charges if trial is demanded, but may reflect that a commander selected one or two primary offenses to be dealt with by Article 15 and could list all offenses for a court-martial.

a. Article 31b, UCMJ, Rights Warnings. The soldier should initially be advised that: (1) he or she is suspected of having committed an offense; (2) he or

she has the right to remain silent; and (3) anything said may be used against him or her in the Article 15 proceeding or in a court-martial.

b. Right to Demand Trial. Unless the individual is attached to or embarked in a vessel, he or she may demand trial by court-martial in lieu of an Article 15. If the soldier does not demand a court-martial, then the commander may proceed under Article 15. If the soldier demands trial by court-martial, the Article 15 proceedings must stop. The commander must then decide whether to prefer court-martial charges. As a practical matter, a commander considering punishment under Article 15 should ensure, before proceeding, that a "good case" exists against the individual; otherwise, the commander could find himself in the unenviable position of not being able to prefer charges in the case of an Article 15 turn-down because of the strong likelihood of acquittal or even dismissal. An Article 15 generally should not be offered unless the commander is satisfied that the case can be won at trial.

c. Right to Consult with Counsel. The soldier must be informed of the right to consult with counsel before making any further decisions regarding the Article 15. For purposes of nonjudicial punishment, "counsel" means (1) a judge advocate, (2) a Department of the Army civilian attorney, or (3) an officer who is a member of the bar of a federal court or of the highest court of a state. Included within this right is notice of the location of qualified counsel and a reasonable time (suggested to be 48 hours) to consult with the counsel.

d. Open Hearing. The soldier may request that the proceedings be open to the public. In all cases the imposing commander decides if the hearing is open or closed. Whether the proceeding is open or not, it is still informal and nonadversarial. The individual has the right to have this proceeding in the presence of the commander who intends to impose the punishment unless such an "appearance is prevented by the unavailability of the commander or by extraordinary circumstances." In those circumstances, the commander will appoint a commissioned officer to hear the soldier's case and make a written summary and recommendations. The commander then makes his decision based on the written summary and recommendations (AR 27-10, para. 3-18g).

e. Spokesperson. The soldier may wish to have a spokesperson present during the proceedings. The spokesperson need not be a lawyer, and no travel costs

or other unusual costs may be incurred at Government expense for the spokesperson's presence. The role of spokesperson must be voluntary; he or she may not be ordered to participate. Neither the spokesperson nor the soldier has a right to question or cross-examine any witnesses who may appear unless the commander agrees. The spokesperson or the soldier may, however, propose lines of questioning or relevant areas to pursue.

f. Witnesses. Should the soldier request witnesses, the commander decides whether they are available. If the witnesses are located at the installation or nearby, they are considered available if their attendance would not unnecessarily delay the proceedings. No witness fees or transportation fees are authorized.

g. Right to Appeal. The soldier should be advised of the right to appeal the punishment (more on this later).

3. Consultation with Counsel.

The commander will provide a reasonable opportunity (normally 48 hours) for the soldier to consult with counsel and decide whether to demand court-martial. If at the end of the designated time (including extensions) the soldier has not demanded trial by court-martial, the commander may impose punishment. The commander may also impose the Article 15 if the individual refuses to complete or sign Block 3 of the DA Form 2627 after having been given a reasonable time to do so. The individual should be told during the initial notification that punishment can be imposed if he or she fails to make a timely demand for trial or refuses to sign. If punishment is imposed under these conditions, the DA Form 2627 will reflect that fact at item 4 (see AR 27-10, para. 3-18f(4)).

4. Hearing.

After consulting with counsel, the soldier returns to the commander and completes DA Form 2627 indicating what options are to be exercised (demand trial, open hearing, etc.). If the soldier elects to proceed under Article 15, a hearing takes place at which the commander determines the guilt or innocence of the soldier. During the hearing the commander hears and considers all the evidence for and against the soldier, and if the soldier is found guilty, evidence of extenuating and/or mitigating factors. See Appendix B, AR 27-10

(reproduced at Appendix C, page 4-23), for further guidance in conducting the hearing.

The commander is not bound by the formal rules of evidence, except those pertaining to privileges, and may consider any matter, including unsworn statements, he or she reasonably believes to be relevant to the offense. The standard for guilt at the Article 15 proceeding is proof beyond a reasonable doubt.

REFERENCE: MCM, Part V, para. 4; AR 27-10, paras. 3-17, 3-18.

D. Article 15 Punishments

A field grade officer has substantially more punishment power than a company grade officer. See the punishment chart at Appendix D, page 4-27. If a company grade officer does not feel that his or her punishment authority is sufficient, the case may be forwarded to the first field grade officer in the chain of command. The company grade officer may recommend that the field grade officer exercise Article 15 power in the case; however, AR 27-10 prohibits a specific recommendation as to the nature or extent of the punishments which should be imposed. (AR 27-10, para. 3-5).

There are four general types of Article 15 punishments: censure, loss of liberty, deprivation of pay, and reduction in grade.

1. Censure.

There are two types of censure: admonition and reprimand. For enlisted personnel, admonitions and reprimands may be oral or written. For officers, they must be written. The admonition is a warning that if the particular conduct is repeated, adverse action will follow. The reprimand is a means of condemning past conduct. The censure should specifically indicate that it is being imposed as punishment under Article 15 (AR 27-10, para. 3-3b).

2. Loss of Liberty.

There are five types of punishment involving loss of liberty that can be imposed under Article 15:

a. Correctional Custody may be imposed upon enlisted soldiers in the grade of E-3 or below. Correctional custody may only be imposed if a correctional custody facility is available for use.

b. Arrest in Quarters is reserved for commissioned officers or warrant officers. While in this status the individual may not exercise command. If a superior commander, knowing of the arrest status, assigns command duties to the officer, the arrest terminates (AR 27-10, para. 3-19b(4)).

c. Extra Duty may be performed at any time and for any length of time within the duration of the punishment. Normal extra duties might include fatigue details, but no duty may be imposed as extra duty which constitutes cruel or unusual punishment, or a punishment not sanctioned by service customs, is normally intended as an honor (e.g., guard of honor), requires the soldier to perform in a ridiculous or unnecessarily degrading manner, constitutes a safety or health hazard to the offender, or would demean the soldier's position as a NCO or specialist.

d. Restriction means that the individual must remain within specified limits (e.g., company area). The limits may be changed later as long as the new limits are not more restrictive than the original limits. Unless otherwise specified, the individual continues to perform military duties.

e. Confinement on diminished rations may be imposed only upon enlisted personnel in the grade of E-3 or below who are attached to or embarked on a vessel (MCM, Part V, para. 5c(5) and AR 27-10, para. 3-19b(2)).

3. Deprivation of Pay.

Forfeiture of pay is a permanent loss of basic pay, sea pay, and foreign duty pay. If the imposed punishment includes a reduction, the forfeiture is based on the lower pay grade. Forfeitures can be applied against a soldier's retirement pay.

An imposed punishment of forfeiture of pay should be indicated in dollar amounts as follows (AR 27-10, para. 3-19b(7)):

When the forfeiture is to be applied for not more than 1 month:

"Forfeiture of $_____,"

When the forfeiture is to be applied for more than 1 month:

"Forfeiture of $_____ per month for 2 months."

4. Reduction in Grade.

A reduction in grade is the most severe form of nonjudicial punishment. It affects not only the amount of pay the individual will receive but often results in loss of privileges and responsibilities.

The following rules relate to this form of punishment:

a. A reduction may be imposed only by a commander who has general authority to promote to the grade that the soldier currently holds. AR 600-8-19 provides:

The commanders below may promote, subject to authority and responsibility by higher commanders, as follows:

Grades	Promotion Authority
E-4 and below	Company grade commanders, (Para. 1-9).
E-5 and E-6	Field grade commanders of any unit authorized a commander in the grade of lieutenant colonel (05) or higher, (Para. 3-1).
E-7, E-8 and E-9	Headquarters, Department of the Army, (Para. 4-1).

Paragraph 6-3h, AR 600-8-19, prohibits the reduction for misconduct of personnel in grades E-7 through E-9 under Article 15.

b. An individual in grade E-5 or E-6 or above may be reduced only one grade at a time in peacetime (MCM, Part V, para. 5b(2)(B)(iv)).

c. The new date of rank is the date the reduction is imposed. If the commander suspends the reduction, the date of rank for the grade held before imposition remains the same (AR 27-10, para. 3-19b(6)(c)).

5. Combinations of Punishments.

Normally, no two or more punishments involving deprivation of liberty may be combined to run either

consecutively or concurrently. Restriction and extra duties may be combined, however, in any manner to run for a length of time not exceeding the maximum period for extra duties (45 days for field grade punishment, 14 days for company grade punishment).

6. Effective Date of Punishments.

A punishment is "imposed" on the date the commander signs the DA Form 2627 (Items 4-6, DA Form 2627, or Items 2-3, DA Form 2627-1). All punishments, if unsuspended, take effect the date they are imposed unless the commander, or a superior authority, prescribes otherwise.

If, when punishment is imposed, the soldier indicates a desire to appeal the punishment, the command has five calendar days (3 days for summarized proceedings) excluding the date of submission, to decide the appeal. If the appeal is not decided in this five-day period, punishments involving loss of liberty (correctional custody, extra duty, restriction, etc.) will be interrupted at the soldier's request pending decision on the appeal (AR 27-10, para. 3-21).

REFERENCE: MCM, Part V, para. 5; AR 27-10, paras. 3-19 through 3-22.

E. Appeals

As noted earlier, one of the rights available to an individual being punished under Article 15 is the right to appeal. The recognized grounds for appeal are:

- Based on the evidence, the soldier was not guilty.

- Punishment was disproportionate to the offense.

- Punishment was unjust because it did not comply with the law and regulations (MCM, Part V, para. 7a; AR 27-10, para. 3-31).

The appeal is started with a notation on the DA Form 2627 in Item 7, when the soldier indicates a desire to appeal the punishment. Only one appeal is permissible in Article 15 proceedings. An appeal not made within a reasonable period of time may be rejected by the appellate authority. Normally, an appeal submitted within 5 days after imposition of the punishment is considered timely. The commander may extend that time for good cause. (AR 27-10, para. 3-29). If, at the

time of imposition of punishment, the soldier indicates a desire not to appeal, the superior authority may reject a subsequent election to appeal, even if it is made within the 5-day period (AR 27-10, para. 3-29). The decision to file the Article 15 in the performance or restricted fiche (Item 5, DA Form 2627) is not subject to appeal (AR 27-10, para. 3-33).

Who acts on the appeal? The soldier's appeal is routed through the commander who imposed the punishment. This commander may reconsider and take mitigating action. If the commander so acts, the individual should be informed and asked whether, in view of the commander's clemency action, he or she wants to withdraw the appeal. Unless the appeal is voluntarily withdrawn, it is forwarded to the appellate authority, who is the authority "next superior" to the commander who imposed the punishment. For example, an appeal from an Article 15 imposed by a company commander would be sent to the soldier's battalion commander (AR 27-10, para. 3-30).

If the individual is transferred before the appeal is started, the appeal would be sent to the "new" appellate authority (i.e., the new battalion commander if we extend the example given above).

You will also recall that when we discussed the delegation of authority to impose an Article 15, we noted that in limited cases the authority could be delegated. The same holds true here. A "superior authority" who is a commander exercising general court-martial jurisdiction or is a general officer in command may delegate appellate powers to a commissioned officer of the command who is actually serving as a deputy or assistant commander. Such a commander may also delegate Article 15 appellate authority to a chief of staff who is a general officer.

1. Review by Judge Advocate.

Before an appellate authority may act, a judge advocate must review the case (Item 8, DA Form 2627; Note 9, back of DA Form 2627) if the punishment includes any of the following:

a. Arrest in quarters for more than seven (7) days;

b. Correctional custody for more than seven (7) days;

c. Forfeiture of more than seven (7) days' pay;

d. Reduction of one or more pay grades from the fourth or a higher pay grade;

e. Extra duties for more than 14 days;

f. Restriction for more than 14 days.

2. Options.

The appellate authority has a number of available options in deciding what action to take on an Article 15. The punishment may be approved as it stands (assuming that it is valid), but it may not be increased in either quality or quantity. The remaining options are actions which are viewed as lessening the imposed punishment.

a. Suspension. The purpose of suspending the punishment (or portions thereof) is to provide a probationary period for the soldier. If the soldier commits further misconduct amounting to an offense under the UCMJ, or violates a written condition of suspension during the period of suspension, the suspension may be "vacated" and the punishment executed. If the punishment is not vacated before the end of the period of suspension, however, the punishment will be automatically cancelled. Note that misconduct which causes a suspension to be vacated may also be the subject of a new Article 15.

Several special rules on suspension should be noted (MCM, Part V, para. 6a):

(1) An executed punishment of reduction or forfeiture may be suspended only within a period of four months after the date of imposition.

(2) Suspension of a punishment may not be for a period longer than six months from the date of suspension.

(3) Expiration of enlistment or term of service automatically terminates the suspension.

(4) Although a formal hearing is not required to vacate a suspension, the soldier should, unless impracticable, be given an opportunity to appear before the commander and present matters in defense, extenuation, or mitigation, if the punishment in question is one of those which would require judge advocate review (see preceding section).

b. Mitigation. Mitigation is a reduction of the quantity or quality of the punishment while the general nature of the punishment remains the same (AR 27-10, para. 3-26).

Example: Restriction for 14 days is reduced to restriction for seven days, or extra duties for 14 days is reduced to restriction for 14 days.

Example: Reduction in grade is converted to forfeiture of pay. Note: This is an exception to the rule which requires the general nature of the punishment to remain the same. Furthermore, in this instance care should be exercised to ensure that the mitigated punishment of forfeiture of pay, added to any other forfeitures which might have been originally imposed, does not exceed the maximum amount of loss of pay which could have been originally imposed.

c. Remission. This action cancels any unserved portion of the punishment. Remission does not cancel the Article 15 itself, only that portion of the punishment which has not been served. Note that an unsuspended reduction in grade is executed immediately and therefore, can never be remitted. A discharge automatically remits the unserved portion of the punishment (A person punished under Article 15 may not be held past his or her ETS to complete unserved punishments.) (AR 27-10, para. 3-27).

d. Setting Aside. If the punishment results in a clear injustice, the punishment or any portion thereof may be set aside and the soldier's rights and property restored. The punishment set aside may be executed or unexecuted (AR 27-10, para. 3-28). Set aside actions should normally be taken within four months of the imposition of the punishment (MCM, Part V, para. 6d), but such actions may be taken even after four months where there are unusual circumstances.

Although mitigating actions are normally taken on "appeal," the commander who imposed the punishment could take these steps even in the absence of an appeal, formal or otherwise. In addition, a "successor in command" to the commander who imposed the punishment may also take action on the punishment. Furthermore, any "superior authority" may take these actions. For example, Jones appeals her Article 15 (imposed by her company commander) to her battalion commander, who in turn approves the punishment. The brigade commander may learn of the situation and suspend a portion of the

punishment even though Jones has no right of appeal to the brigade commander (AR 27-10, para. 3-35). A quick reference to all mitigating actions is located at Appendix E at page 4-26 of this text.

REFERENCE: MCM, Part V, paras. 6, 7; AR 27-10, paras. 3-23 through 3-35.

F. Summarized Procedures

A commander may utilize summarized proceedings when dealing with the misconduct of an enlisted member of the command. The punishment imposed may not exceed 14 days restriction, 14 days extra duty, an oral reprimand or admonition, or any combination of these sanctions. The imposing commander or a designated subordinate (officer or noncommissioned officer in the grade of E-7 or above) will inform the soldier of the following:

1. The intent to proceed under Article 15, UCMJ.

2. The intent to use summarized proceedings.

3. The maximum punishment under summarized proceedings.

4. The right to remain silent.

5. The offenses allegedly committed and the articles of the UCMJ violated.

6. The right to demand trial.

7. The right to confront witnesses, examine adverse evidence, and submit matters in defense, extenuation and mitigation.

8. The right to appeal.

The soldier will be given a reasonable time (normally 24 hours) to decide whether to demand trial or to gather matters in defense, extenuation, and mitigation. There is no right to consult with legally qualified counsel. A spokesperson will not accompany the soldier at the proceedings. The soldier will be given a reasonable time (normally 5 days) to appeal. If an appeal is taken, punishment may be served pending a decision on appeal. Appeals should be promptly decided. If not decided within 3 calendar days, and if the soldier so requests, further performance of any punishment involving deprivation of liberty (extra duty and restriction) will be delayed pending decision on the

appeal. The summarized proceedings will be legibly recorded on DA Form 2627-1, an example of which is located at Appendix B, page 4-21. The form may be handwritten.

G. Filing

For soldiers in pay grade E-4 and below, all formal Article 15s (DA Form 2627) are filed locally in unit nonjudicial punishment files. They remain there for two years or until transfer to another general court-martial convening authority, whichever occurs first. For all other soldiers, records of formal Article 15s are filed in the Official Military Personnel File (OMPF). The imposing commander decides whether the Article 15 will be filed in the performance fiche or the restricted fiche of the OMPF. If, however, a soldier has an Article 15 in his or her restricted fiche, received while the soldier was a sergeant (E-5) or above, then any subsequent Article 15 will be filed in the soldier's performance fiche, regardless of the imposing commander's filing designation. The performance fiche is routinely used by career managers and selection boards, and a filing on this fiche will likely have an adverse impact on the soldier's career. Access to the restricted fiche is typically more limited.

Summarized Article 15s (DA Form 2627-1) are maintained locally. They remain there for two years or until transfer from the unit. Summarized Article 15s may not be used in subsequent court-martial proceedings, but they may be used in adverse administrative actions.

REFERENCE: AR 27-10, paras. 3-36 through 3-40.

H. Supplemental Action

Even after action has been taken on an appeal and/or after DA Form 2627 has been properly filed, a commander can still take supplemental action on the Article 15. Such action may include mitigation, remission, suspension, set aside, or vacation, so long as it is taken within the time limits prescribed for each action (see Appendix F at page 4-27). The supplemental action is recorded on DA Form 2627-2 (see Appendix F at page 4-29 for an example).

REFERENCE: AR 27-10, para. 3-38.

I. Publicizing of Article 15s

Article 15 punishment may be announced at the next unit formation after punishment is imposed or, if appealed, after the decision on the appeal. It also may be posted on the unit bulletin board. The purpose of announcing the results of punishments is to preclude perceptions of unfairness of punishment and to deter similar misconduct by other soldiers. An inconsistent or arbitrary policy should be avoided regarding the announcement of punishment, to preclude the appearance of vindictiveness or favoritism. In deciding whether to announce punishment of soldiers in the grade of E5 or above, the following should be considered:

a. The nature of the offense.

b. The individual's military record and duty position.

c. The deterrent effect.

d. The impact on unit morale or mission.

e. The impact on the victim.

f. The impact on the leadership effectiveness of the individual concerned.

REFERENCE: AR 27-10, para. 3-22.

J. Administrative Consequences

Records of nonjudicial punishment may result in serious consequences not directly associated with the punishment imposed. Under some circumstances, the Article 15 must be reported to the National Criminal Information Center (NCIC). This is generally true only for serious offenses (see Appendix H at page 4-28). The NCIC can be accessed by certain governmental agencies nationwide and could adversely impact the soldier's ability to obtain certain civilian jobs. In addition, a formal Article 15 is generally admissible at trial if the soldier is subsequently court-martialed. On the other hand, summarized Article 15s are not generally admissible at courts-martial. Any type of Article 15 can be considered in Army administrative proceedings or actions such as administrative separation boards and bars to reenlistment. An Article 15 is not, however, an automatic bar to reenlistment.

REFERENCE: AR 27-10, paras. 3-44 and 5-26a(4); AR 601-280, para. 6-4d(7); AR 635-200.

RECORD OF PROCEEDINGS UNDER ARTICLE 15, UCMJ

For use of this form, see AR 27-10; the proponent agency is TJAG.

See Notes on Reverse Before Completing Form

NAME: AGER, Robert L. | GRADE: E4 | SSN: 000-00-0000 | UNIT: Co D, 1/5 Inf, Ft Blank, VA 00000-0000 | PAY *(Basic & Sea/Foreign)*: $830.40

1. I am considering whether you should be punished under Article 15, UCMJ, for the following misconduct: 1/ **At Ft Blank, VA, on or about 0600 hours, 5 Sep 97, you did, without authority, fail to go at the time prescribed to your appointed place of duty, to wit: Formation, Co D, 1/5 Inf, in front of Building 13. This is in violation of Article 86, UCMJ.**

2. You are not required to make any statements, but if you do, they may be used against you in this proceeding or at a trial by court-martial. You have several rights under this Article 15 proceeding. First I want you to understand I have not yet made a decision whether or not you will be punished. I will not impose any punishment unless I am convinced beyond a reasonable doubt that you committed the offense(s). You may ordinarily have an open hearing before me. You may request a person to speak on your behalf. You may present witnesses or other evidence to show why you shouldn't be punished at all *(matters of defense)* or why punishment should be very light *(matters of extenuation and mitigation)*. I will consider everything you present before deciding whether I will impose punishment or the type and amount of punishment I will impose. 2/ If you do not want me to dispose of this report of misconduct under Article 15, you have the right to demand trial by court-martial instead. 3/ In deciding what you want to do you have the right to consult with legal counsel located at **Room 7, Building 10, Ft Blank, VA**. You now have 48 hours to decide what you want to do. 4/

DATE: 6 Sep 97 | TIME: 0800 hours | NAME, GRADE, AND ORGANIZATION OF COMMANDER: JAMES A. SMITH, CPT, Co D, 1/5 Inf | SIGNATURE: James A. Smith

3. Having been afforded the opportunity to consult with counsel, my decisions are as follow: *(Initial appropriate blocks, date, and sign)*

a. [ ] I demand trial by court-martial.

b. [RLA] I do not demand trial by court-martial and in the Article 15 proceedings:

(1) I request the hearing be [RLA] Open [ ] Closed. *(2)* A person to speak in my behalf [ ] Is [RLA] Is not requested. *(3)* Matters in defense, mitigation, and/or extenuation: [ ] Are not presented [RLA] Will be presented in person [ ] Are attached.

DATE: 7 SEP 97 | NAME AND GRADE OF SERVICE MEMBER: ROBERT L. AGER, SP4 | SIGNATURE: Robert L. Ager

4. In a(n) [JAS] Open [ ] Closed hearing 1/ all matters presented in defense, mitigation, and/or extentuation, having been considered, the following punishment is imposed: 5/6/ **Reduction to Private First Class (E3), suspended, to be automatically remitted if not vacated before 5 Nov 97; and forfeiture of $100.00.**

[NOTE: REFER TO PARA 3-37b(1) PRIOR TO COMPLETING ITEM 5.]

5. ~~I direct the original DA Form 2627 be filed in the [ ] performance fiche [ ] restricted fiche of the OMPF~~ N/A

6. You are advised of your right to appeal to the Cdr, 1/5 Inf within 5 calendar days. An appeal made after that time may be rejected as untimely. Punishment is effective immediately unless otherwise stated above.

DATE: 7 Sep 97 | NAME, GRADE, AND ORGANIZATION OF COMMANDER: JAMES A. SMITH, CPT, Co D, 1/5 Inf | SIGNATURE: James A. Smith

7. *(Initial appropriate block, date, and sign)*

a. [ ] I do not appeal b. [RLA] I appeal and do not submit additional matters 8/9/ c. [ ] I appeal and submit additional matters 8/9/

DATE: 7 SEP 97 | NAME AND GRADE OF SERVICE MEMBER: ROBERT L. AGER, SP4 | SIGNATURE: Robert L. Ager

8. I have considered the appeal and it is my opinion that: **The proceedings were conducted in accordance with law and regulation and the punishments imposed were not unjust nor disproportionate to the offense committed.**

DATE: 8 Sep 97 | NAME AND GRADE OF JUDGE ADVOCATE: LEWIS H. RANE, MAJ | SIGNATURE: Lewis H. Rane

9. After consideration of all matters presented in appeal, the appeal is:

[LZL] Denied [ ] Granted as follows: 10/

DATE: 9 Sep 97 | NAME, GRADE, AND ORGANIZATION OF COMMANDER: LYMAN Z. LIPE, LTC, 1/5 Inf | SIGNATURE: Lyman Z. Lipe

10. I have seen the action taken on my appeal. | DATE: 9 SEP 97 | SIGNATURE OF SERVICE MEMBER: Robert L. Ager

11. ALLIED DOCUMENTS AND/OR COMMENTS 11/12/13/

Statement by SFC Jones, dated 5 Sep 97

[NOTE: SEE CHAPTER 15]

DA FORM 2627, AUG 84 — EDITION OF NOV 82 IS OBSOLETE

Figure 3-2. DA Form 2627 Illustrated

NOTES

1/ Insert a concise statement of each offense in terms stating a specific violation and the Article of the UCMJ *(Part IV, MCM)*. If additional space is needed, use item 11 or continuation sheets as described in note 11 below.

2/ Inform the member of the maximum punishment which may be imposed under Article 15.

3/ Inform the member that if he or she demands trial, trial could be by SCM, SPCM, or GCM. Additionally, inform the member that he or she may object to trial by SCM and that at SPCM or GCM he or she would be entitled to be represented by qualified military counsel, or by civilian counsel at no expense to the government. If the member is attached to or embarked in a vessel, he or she is not permitted to refuse Article 15 punishment. In such cases, all reference to a demand for trial will be lined out and an appropriate remark will be made in item 11 indicating the official name of the vessel and that the member was attached to or embarked in the vessel at the time punishment was imposed.

4/ Give the member copy 5 of this form.

5/ Offenses determined not to have been committed will be lined out. If the imposing commander decides not to impose any punishment, the member will be notified and all copies of this form destroyed.

6/ Amounts of forfeitures of pay will be rounded off to the next lower whole dollar. If a punishment is suspended, the following statement should be added after it: To be automatically remitted if not vacated before *(date)*. If punishment includes a written admonition or reprimand, it will be attached to this form and listed in item 11.

7/ The imposing commander will initial the appropriate block. The OMPF performance fiche is routinely used by MOS/specialty career managers and DA selection boards. The OMPF restricted fiche is not given to MOS/speciality career managers or DA selection boards without approval of the Cdr, MILPERCEN or selection board proponent.

8/ If the member appeals, this form and all written evidence considered by the imposing commander will be forwarded to the superior authority.

9/ Before acting on an appeal, it must be referred to a judge advocate for advice when the punishment, whether or not suspended, includes reduction of one or more pay grades from the fourth or a higher pay grade, or is in excess of one of the following: 7 days arrest in quarters, 7 days correctional custody, 7 days forfeiture of pay, or 14 days of either extra duties or restriction. *(See Article 15e(1) to (7), UCMJ.)*

10/ The superior authority will initial the appropriate block. If the appeal is granted, the specific relief granted will be stated according to note 12.

11/ In this space indicate the number of pages attached as follows: Allied documents on appeal consist of _____ pages. Allied documents include all written matters considered by the imposing commander submitted by the member on appeal and the commander's rebuttal, if applicable. If additional space is needed for completion of any item*(s)*, use plain bond headed "Continuation Sheet 1", etc.

12/ Applicable portions of the following format may be used to record action taken on appeal. Appropriate language should be entered in item 11 or, if necessary, on a continuation sheet. Supplementary actions *(para 3-38, AR 27-10)* will be recorded on DA Form 2627-2.

Suspension, Mitigation, Remission, or Setting Aside

(DATE)

On *(date)*, the punishment(s) of_____
imposed on *(date of punishment) (was) (were) (suspended and will be automatically remitted if not vacated before (date)) (mitigated to) (set aside, and all rights, privileges, and property affected restored) (by my order) (by order of) (the officer who imposed the punishment) (the successor in command to the imposing commander) (as superior authority)*.

(Typed name, grade, and organization of commander) /s/_____

13/ Racial/ethnic identifiers will be placed in Item 11 *(Chapter 15, AR 27-10)*.

Reverse of DA Form 2627, Aug 84

Page 4–20

Figure 3–2. DA Form 2627 illustrated—Continued

SUMMARIZED RECORD OF PROCEEDINGS UNDER ARTICLE 15, UCMJ

For use of this form, see AR 27-10; the proponent agency is TJAG.

See Notes on Reverse Before Completing Form

This form will be used only in cases involving enlisted personnel and then *ONLY* when no punishment *OTHER THAN* oral admonition or reprimand, restriction for 14 days or less, extra duties for 14 days or less, or a combination thereof has been imposed.1/

NAME	GRADE	SSN	UNIT
HABE, ALFRED H.	E-3	111-11-1111	A Btry 9/10 FA, 13 INF DIV FT BLANK, VA

1. On 15 JUNE 1985, the above service member was advised that I was considering imposition of nonjudicial punishment under the provisions of Article 15, UCMJ, Summarized Proceedings, for the following misconduct:2/

On or about 0900 hours 13 June 1985, you were absent without authority from A Btry, 9/10 FA, 13th Inf Div, located at Ft Blank, VA, and remained so absent until on or about 0800 hours, 14 June 1985, in violation of Article 86, UCMJ.

2. The member was advised that no statement was required, but that any statement made could be used against him or her in the proceeding or in a court-martial. The member was also informed of the right to demand trial by court-martial3/, the right to present matters in defense, extenuation and/or mitigation, that any matters presented would be considered by me before deciding whether to impose punishment, the type or amount of punishment, if imposed, and that no punishment would be imposed unless I was convinced beyond a reasonable doubt that the service member committed the misconduct. The service member was afforded the opportunity to take 24 hours to make a decision regarding these rights. No demand for trial by court-martial was made. After considering all matters presented, the following punishment was imposed:4/

Oral reprimand and restriction for 14 days.

3. The member was advised of the right to appeal to the Cdr 9/10 FA, 13 Inf Div within 5 calendar days, that an appeal made after that time could be rejected as untimely, and that the punishment was effective immediately unless otherwise stated above. The member:

[AHH] Elected immediately not to appeal [ ] Requested time to decide whether to appeal and the decision is indicated in item 4, below5/6/

DATE	NAME, GRADE, AND ORGANIZATION OF IMPOSING COMMANDER	SIGNATURE
15 June 1985	Richard J. Moad, Cpt, A Btry, 9/10 FA	Richard J. Moad

4. *(Initial appropriate block, date, and sign)*

a. [AHH] I do not appeal b. [ ] I appeal and do not submit matters for consideration7/ c. [ ] I appeal and submit additional matters7/

DATE	NAME AND GRADE OF SERVICE MEMBER	SIGNATURE
15 June 1985	ALFRED H. HABE, E-3	Alfred H. Habe

5. After consideration of all matters presented in appeal, the appeal is:

[ ] Denied [ ] Granted as follows:8/

DATE	NAME, GRADE, AND ORGANIZATION OF COMMANDER	SIGNATURE

6. I have seen the action taken on my appeal.	DATE	SIGNATURE OF SERVICE MEMBER

7. ALLIED DOCUMENTS AND/OR COMMENTS9/10/11/

[SEE CHAPTER 15]

DA FORM 2627-1 AUG 84 EDITION OF NOV 82 IS OBSOLETE

Figure 3–1. DA Form 2627–1 illustrated

NOTES

1/ See AR 27-10 for further guidance. Ordinarily entries on this form will be handwritten in ink.

2/ Insert a concise statement of each offense in terms stating a specific violation and the Article of the UCMJ. If additional space is needed, use item 7 and/or continuation sheets as described in note 9 below.

3/ Inform the member that if he or she demands trial, trial could be by SCM, SPCM, or GCM. Additionally, inform the member that he or she may object to trial by SCM and that at SPCM or GCM he or she would be entitled to be represented by qualified military counsel, or by civilian counsel at no expense to the government. If the member is attached to or embarked in a vessel, he or she is not permitted to refuse Article 15 punishment. In such cases, all reference to a demand for trial will be lined out and an appropriate remark will be made in item 7 indicating the official name of the vessel and that the member was attached to or embarked in the vessel at the time punishment was imposed.

4/ Offenses determined not to have been committed will not be listed. If the imposing commander decides not to impose punishment, the member will be notified and no copies of this record will be prepared. If a punishment is suspended, the following statement should be added after it: "To be automatically remitted if not vacated before (date)."

5/ If the member immediately elects not to appeal, item 5 will not be completed.

6/ The imposing commander will initial the appropriate block.

7/ If the individual appeals, this form and all matters set forth in item 7 will be forwarded to the superior authority.

8/ The superior authority will initial the appropriate block. Refer to note 10, below.

9/ In this space indicate the number of pages as follows: Allied documents on appeal consist of _____ pages. Allied documents include all written matters considered by the imposing commander, submitted by the member on appeal, commander's rebuttal, and copies of supplementary actions taken on the punishment. Supplementary actions will be recorded in accordance with note 10. If additional space is needed for completion of any item(s), use plain bond headed "Continuation Sheet 1," etc.

10/ Applicable portions of the following suggested formats may be used to record action taken on an appeal and supplementary actions for summarized Article 15 proceedings. Appropriate language should be entered in item 7 or, if necessary, on continuation sheets.

a. Suspension, Mitigation, Remission, or Setting Aside.

On *(date)* the punishment(s) of _____, imposed on *(date of punishment) (was) (were) (suspended and will be automatically remitted if not vacated before (date)) (mitigated to) (set aside, and all rights, privileges, and property affected restored) (by my order) (by order of) (the officer who imposed the punishment) (the successor in command to the imposing commander) (as superior authority).*

(Typed name, grade, and organization of commander) /s/_____

b. Vacation of Suspension

The suspension of the punishment(s) of _____ imposed on *(date of punishment) (is) (are)* hereby vacated. The unexecuted portion(s) of the punishment(s) will be duly executed.

(Typed name, grade, and organization of commander) /s/_____

11/ Racial/ethnic identifiers will be placed in item 7 *(Chap 15, AR 27-10)*.

Reverse of DA Form 2627-1, Aug 84

Figure 3–1. DA Form 2627–1 illustrated—Continued.

Appendix B
Suggested Guide for Conduct of Nonjudicial Punishment Proceedings

Note. This guide is designed to ensure that the proceedings comply with all legal requirements. It contemplates a three-step process conducted in the presence of the soldier, consisting of (1) notification, (2) hearing (that may be omitted if the soldier admits guilt), and (3) imposition of punishment (if the findings result in determination of guilt).) This guide may be tailored for formal and summarized nonjudicial punishment proceedings.

B–1. Notification

Note. (If the notification of punishment is to be accomplished by other than the imposing commander, the procedures under this provision should be appropriately modified (see note q(4) below)).

a. Statements of CO.

(1) As your commander, I have disciplinary powers under Article 15 of the UCMJ. I have received a report that you violated the Uniform Code, and I am considering imposing nonjudicial punishment. This is not a formal trial like a court-martial. As a record of these proceedings I will use DA Form 2627. I now hand you this form. Read items 1 and 2. Item 1 states the offense(s) you are reported to have committed and item 2 lists the rights you have in these proceedings. Under the provisions of Article 31 of the UCMJ, you are not required to make any statement or provide any information concerning the alleged offense(s). If you do, it may be used against you in these proceedings or in a trial by court-martial. You have the right to consult with a lawyer as stated in item 2.

Note. Wait for the soldier to read items 1 and 2 of DA Form 2627. Allow him or her to retain copy five of the form until the proceedings are finished and you have either imposed punishment or decided not to impose it.

(2) Do you understand item 1? Do you understand the offense(s) you are reported to have committed?

b. Response of soldier. Yes/No.

Note. If the soldier does not understand the offense(s), explain the offense(s) to him/her.

c. Statement of CO. Do you understand item 2? Do you have any questions about your rights in these proceedings?

d. Response of soldier. Yes/No.

Note. If the soldier does not understand his or her rights, explain them in greater detail. If the member asks a question you cannot answer, recess the proceedings. You probably can find the answer in one of the following sources: Article 15, UCMJ, Part V of the Manual for Courts-Martial (MCM); or contact your JA office.

e. Statement of CO. There are some decisions you have to make:

(1) You have to decide whether you want to demand trial by court-martial. If you demand a court-martial these proceedings will stop. I then will have to decide whether to initiate court-martial proceedings against you. If you were to be tried by court-martial for the offense(s) alleged against you, you could be tried by summary court-martial, special court-martial, or general court-martial. If you were to be tried by special or general court-martial you would be able to be represented by a military lawyer appointed at no expense to you or by a civilian lawyer of your choosing at no expense to the government.

(2) If you do not demand trial by court-martial, you must then decide whether you want to present witnesses or submit other evidence in defense, extenuation, and/or mitigation. Your decision not to demand trial by court-martial will not be considered as an admission that you committed the offense(s); you can still submit evidence in your behalf.

(a) Evidence in defense are facts showing that you did not commit the offense(s) stated in item 1. Even if you cannot present any evidence in defense, you can still present evidence in extenuation or mitigation.

(b) Evidence in extenuation are circumstances surrounding the offense, showing that the offense was not very serious.

(c) Evidence in mitigation are facts about you, showing that you are a good soldier and that you deserve light punishment.

(3) You can make a statement and request to have a spokesperson appear with you and speak on your behalf. I will interview any available witnesses and consider any evidence you think I should examine.

(4) Finally, you must decide whether you wish to request that the proceedings be open to the public. Do you understand the decisions you have to make?

f. Response of soldier. Yes/No.

g. Statements of CO.

(1) If you do not demand trial by court-martial and after you have presented your evidence, I am convinced that you committed the offense, I could then punish you. The maximum punishment I could impose on you would be (punishment).

Note. See table 3–1 for maximum punishments.

(2) You should compare this punishment with the punishment you could receive in a court-martial. (If the soldier requests to be informed of the maximum court-martial sentence you may state the following: The maximum sentence you could receive in a court-martial is (sentence) for the offense(s).)

Note. Part IV, MCM lists for each punitive article the punishments a court-martial may impose for violations of the various Articles of the UCMJ.

The CO

(a) May inform the soldier that referring the charges to a summary or special court-martial would reduce the maximum sentence. For example, a summary court may not impose more than 1 month of confinement at hard labor. A special court may not impose more than 6 months of confinement.

(b) Should not inform the soldier of the particular punishment you may consider imposing until all evidence has been considered.

(3) As item 2 points out, you have a right to talk to an attorney before you make your decisions. A military lawyer whom you can talk to free of charge is located at (location). Would you like to talk to an attorney before you make your decisions?

h. Response of Soldier. Yes/No.

Note. If the soldier desires to talk to an attorney, arrange for the soldier to consult an attorney. The soldier should be encouraged to consult the attorney promptly. Inform the soldier that consultation with an attorney may be by telephone. The soldier should be advised that he or she is to notify you if any difficulty is encountered in consulting an attorney.

i. Statements of CO.

(1) You now have 48 hours to think about what you should do in this case. You may advise me of your decision at any time within the 48-hour period. If you do not make a timely demand for trial or if you refuse to sign that part of DA Form 2627 indicating your decision on these matters, I can continue with these Article 15 proceedings even without your consent. You are dismissed.

Note. At this point, the proceedings should be recessed unless the soldier affirmatively indicates that he or she has made a decision and does not want additional time or to consult with an attorney. In the event the soldier does not make a decision within the specified time or refuses to complete or sign item 3 of DA Form 2627, see paragraph 3–18f. When you resume the proceedings, begin at item 3, DA Form 2627.

(2) Do you demand trial by court-martial?

j. Response of Soldier. Yes/No.

Note. If the answer is yes, continue with next statement.

k. Statements of CO.

(1) Initial block a, sign and date item 3. Because you have demanded trial by court-martial, these proceedings will stop. I now must decide whether to initiate court-martial proceedings against you. I will notify you when I have reached a decision. You are dismissed.

Note. If the answer is no, continue with next statement.

(2) An open hearing means that the proceeding is open to the public. If the hearing is closed, only you, I, designated soldiers of the chain of command, available witnesses and a spokesperson, if designated, will be present. Do you request an open hearing?

l. Response of Soldier. Yes/No.

m. Statement of CO. Do you wish to be accompanied by a spokesperson?

n. Response of Soldier. Yes/No.

o. Statement of CO. Initial block 3b(1) and (2) indicating your decision. Do you want to submit any evidence showing that you did not commit the offense(s), or explaining why you committed the offense(s), or any other information about yourself that you would

like me to know. Do you wish to have any witnesses testify, including witnesses who would testify about your good past military record or character?

p. Response of Soldier. Yes/No.

q. Statement of CO. Now initial block 3b(3) indicating your decision, and sign and date the form in the space provided under that item.

r. Note. The CO will—

(1) Wait until the soldier initials the blocks and signs and dates the form. If the answers to all the questions are no, you may proceed to impose punishment.

(2) If the answer regarding witnesses and evidence is yes, and the soldier is prepared to present his or her evidence immediately, proceed as follows. Consider the evidence presented. If the evidence persuades you that you should not punish the soldier, terminate the proceedings, inform the soldier, and destroy all copies of DA Form 2627. If you are convinced that the soldier committed the offense(s) beyond a reasonable doubt and deserves to be punished, proceed to impose punishment.

(3) If the soldier needs additional time to gather his or her evidence, give the soldier a reasonable period of time to gather the evidence. Tell the soldier when the proceedings will resume and recess the proceedings.

(4) If someone else conducted the notification proceedings, the imposing commander should conduct the remainder of the proceedings. When you resume the proceedings, consider the soldier's evidence. Insure that the soldier has the opportunity he or she deserves to present any evidence. Ask the soldier, "Do you have any further evidence to present?" If the evidence persuades you that you should not punish the soldier, terminate the proceedings, inform the soldier of your decision, and destroy all copies of DA Form 2627. If you are still convinced that the soldier committed the offense(s) and deserves to be punished, impose punishment.

B–2. Imposition of punishment

Statement of CO. I have considered all the evidence. I am convinced that you committed the offense(s). I impose the following punishments: (Announce Punishment.)

I have considered all the evidence and impose the following punishment(s) (Announce punishment(s).)

Note. After you have imposed punishment, complete items 4, 5 and 6 of DA Form 2627, and sign the blank below item 6.

B–3. Appellate Advice

Note. The CO will hand the DA Form 2627 to the soldier.

a. Read item 4 which lists the punishment I have just imposed on you. Now read item 6 which points out that you have a right to appeal this punishment to (title and organization of next superior authority). You can appeal if you believe that you should not have been punished at all, or that the punishment is too severe. Any appeal should be submitted within 5 calendar days. An appeal submitted after that time may be rejected. Even if you appeal, the punishment is effective today (unless the imposing commander sets another date). Once you submit your appeal, it must be acted upon by (title and organization of next superior) within 5 calendar days, excluding the day of submission. Otherwise, any punishment involving deprivation of liberty (correctional custody, restriction or extra duty), at your request, will be interrupted pending the decision on the appeal. Do you understand your right to appeal?

b. Response of Soldier. Yes/No.

c. Do you desire to appeal?

d. Response of Soldier. Yes/No.

Note. If the answer is yes, go to note at e(2). If the answer is no, continue with next statement.

e. Statements of CO.

(1) If you do not want to appeal, initial block a in item 7 and sign the blank below item 7.

Note. Now give the soldier detailed orders as to how you want him or her to carry out the punishments.

(2) You are dismissed.

Note. If the answer is yes, continue with next statement.

(3) Do you want to submit any additional matters to be considered in an appeal?

f. Response of Soldier. Yes/No.

Note. If the answer is yes, go to note at g(1). If the answer is no, continue with next statement.

g. Statements of CO.

(1) Initial block *b* in item 7 and sign the blank below item 7. I will notify you when I learn what action has been taken on your appeal. You are dismissed.

Note. If the answer is yes, continue with next statement.

(2) If you intend to appeal and do not have the additional matters with you, item 7 will not be completed until after you have obtained all the additional material you wish to have considered on appeal. When you have obtained this material, return with it by (specify a date 5 calendar days from the date punishment is imposed) and complete item 7, by initialing the box and signing the blank below. After you complete item 7, I will send the DA Form 2627 and the additional matters you submit to (title and organization of next superior authority). Remember that the punishment will not be delayed (unless the imposing commander sets another date). You are dismissed.

Appendix C
Attorney-Client Guidelines

Note. (These guidelines have been approved by TJAG. Military personnel who act in courts-martial, including all Army attorneys, will apply these principles insofar as practicable. However, the guidelines do not purport to encompass all matters of concern to defense counsel, either trial or appellate. As more problem areas are identified, TJAG will develop a common position and policies for the guidance of all concerned.)

C–1. Problem areas in general

a. Applicability of the attorney-client relationship rules to military practice generally. Military attorneys and counsel are bound by the law and the highest recognized standards of professional conduct. The DA has made the Army Rules of Professional Conduct for Lawyers and the Code of Judicial Conduct of the American Bar Association applicable to all attorneys who appear in courts-martial. Whenever recognized civilian counterparts of professional conduct can be used as a guide, consistent with military law, the military practice should conform.

b. Attorney-client relationship in the military criminal practice.

(1) *Establishment.* When an officer holds himself or herself out as an attorney or is designated on orders as a detailed defense counsel, he or she is regarded, for the purposes of these guidelines, as an attorney and is expected to adhere to the same standards of professional conduct. Any authorized contact with a service soldier seeking his or her services as a defense counsel or as an attorney for himself or herself results in at least a colorable attorney-client relationship, although the relationship may be for a limited time or purpose. When an attorney's assigned or reasonably anticipated military duties indicate that the relationship is for a limited time or purpose, he or she must inform the prospective client of these limitations. There is no service obligation to appoint an attorney as detailed counsel merely because an attorney-client relationship has been established. However, an attorney will not later place himself or herself in the position of acting adversely to the client on the same matter.

(2) *Dissolution.* An attorney should not normally be assigned as a counsel to a case unless he or she can be expected to remain for the trial. If it appears that he or she will not be available for the trial, the client must be notified at the inception of the relationship. Military requirements or orders to move the attorney (as proper personnel management requires) will be respected. An attorney will not, without his or her own agreement, be retained on duty beyond a service appointment merely to maintain an existing relationship with respect to a particular case or client. Since no authority exists to hire a civilian attorney at Government expense to represent a soldier in a court-martial, no former officer should expect to be retained by the Government to represent a soldier with whom that officer has developed an attorney-client relationship. It is regarded as unethical for

Table 3–1
Maximum Punishments

Punishment	Imposed By Company Grade Officers	Imposed By Field Grade Officers	Imposed By Field Grade and General Officers	Imposed By General Officers or GCM Convening Authorities
A. MAXIMUM PUNISHMENT FOR ENLISTED MEMBERS				
(NOTE: The maximum punishment imposable by any commander under Summarized Procedures will not exceed extra duty for 14 days, restriction for 14 days, oral reprimand, or any combination thereof.				
Admonition/Reprimand AND	Yes		Yes	
Extra Duties AND [1]	14 days		45 days	
Restriction or	14 days		60 days	
Correctional Custody [2] (E1 thru E3) or	7 days		30 days	
Restricted Diet Confinement (E1 thru E3 attached or embarked on vessel) AND	3 days		4 days	
Reduction: (E1 thru E4) (E5 thru E6) *AND*	One grade		One or more grades One grade in peacetime [4]	
Forfeiture: [3]	7 days' pay		½ of 1 month's pay for 2 months	
B. PUNISHMENT FOR COMMISSIONED AND WARRANT OFFICERS				
Admonition/Reprimand [7] AND	Yes	Yes		Yes
Arrest *or*	No	No		30 days
Restriction *AND*	30 days	30 days		60 days
Forfeiture	No	No		½ of 1 month's pay for 2 months

C. COMPUTING MONTHLY AUTHORIZED FORFEITURES OF PAY UNDER ARTICLE 15, UCMJ

1. UPON ENLISTED PERSONS

a. (Monthly Basic Pay [3,5]) + (Foreign Pay [3,6]) ÷ 2 = Maximum forfeiture per month if imposed by major or above.

b. (Monthly Basic Pay [3,5]) + (Foreign Pay [3,6]) × 7 ÷ 30 = Maximum forfeiture if imposed by captain or below.

2. UPON COMMISSIONED AND WARRANT OFFICERS WHEN IMPOSED BY AN OFFICER WITH GENERAL COURT-MARTIAL JURISDICTION OR BY A GENERAL OFFICER IN COMMAND.

(Monthly Basic Pay [5]) ÷ 2 = Maximum authorized forfeiture per month.

Notes:

1. Combinations of extra duties and restriction cannot exceed the maximum allowed for extra duty.
2. Subject to limitations imposed by superior authority, and presence of adequate facilities under AR 190–34. If punishment includes reduction to E3 or below, reduction must be unsuspended.
3. Amount of forfeiture is computed at the reduced grade, even if suspended, if reduction is part of the punishment imposed. For Reserve Component (RC) soldiers, use monthly basic pay for the grade and time in service of an Active Component (AC) soldier. (See para 21–9.)
4. Only if imposed by a field grade commander of a unit *authorized* a commander in the grade of 05 or higher. In the RC, reduction is only authorized from grade E5. RC soldiers of grade E6 and higher may not be reduced by Article 15 punishment.
5. At the time punishment is imposed.
6. If applicable.
7. In the case of Commissioned officers and warrant officers, admonitions and reprimands given as nonjudicial punishment must be administered in writing (para 5c(1), Part V, MCM 1984).
8. Forfeitures imposed by a company grade commander may not be applied for more than (1) month against the pay of an Active Army soldier.

COMMAND OPTIONS ON APPEAL

ACTION	PURPOSE	WHEN APPROPRIATE	LIMITATIONS
Approve	Allows punishment to stand as imposed by subordinate commander.	Punishment is legal and not excessive, and soldier does not deserve clemency.	None
Suspend	Suspend all or any part of punishment conditioned on soldier's good conduct.	1. Soldier deserves a second chance. 2. Soldier may perform better with the punishment "hanging" over him.	1. Executed punishment of reduction in grade or forfeiture may be suspended only within 4 months after punishment imposed. 2. Can't suspend for more than 6 months.
Mitigate	Reduce the quantity or quality of the punishment.	1. Original punishment imposed was too harsh for the circumstances. 2. Soldier's subsequent good conduct merits a less severe punishment.	1. Can only mitigate unserved punishments (except reduction in grade, which can be mitigated to a forfeiture of pay). 2. A suspended punishment cannot be mitigated to an unsuspended punishment.
Remit	Cancel any portion of the punishment which has not been served.	1. Original punishment imposed was too harsh for the circumstances. 2. Soldier's subsequent good conduct merits a less severe punishment.	Unsuspended reduction in grade is executed immediately and cannot be remitted (can be mitigated or set aside).
Set Aside	Removes punishment and restores soldier to status before the punishment was imposed.	Punishment was a "clear injustice," i.e., something was wrong with the proceeding or the evidence was insufficient.	Can be exercised only within 4 months after the punishment was executed (except in unusual circumstances, which must be documented).

RECORD OF SUPPLEMENTARY ACTION UNDER ARTICLE 15, UCMJ

For use of this form, see AR 27-10; the proponent agency is The Judge Advocate General.

NAME AND GRADE	SSN	UNIT
AGER, Robert L., E4	000-00-0000	Co D, 1/5 Inf, Ft Blank, VA 00000-0000

TYPE OF SUPPLEMENTARY ACTION *(OTHER THAN BY SUPERIOR AUTHORITY ACTING ON APPEAL)* (Check appropriate box)

[ ] SUSPENSION *(Complete item 1 below)* [ ] MITIGATION *(Complete item 2 below)* [ ] REMISSION *(Complete item 3 below)*
[ ] SETTING ASIDE *(Complete item 4 below)* [XX] VACATION OF SUSPENSION *(Complete item 5 below)*

1. SUSPENSION

The punishment(s) of _____

imposed on the above service member on _____ (is) (are) suspended and will automatically be remitted if not vacated *(date of punishment)*

before _____. *(date)*

2. MITIGATION

The punishment(s) of _____

imposed on the above service member on _____ (is) (are) mitigated to _____ *(date of punishment)*

3. REMISSION

The punishment(s) of _____

imposed on the above service member on _____ (is) (are) remitted. *(date of punishment)*

4. SETTING ASIDE

The punishment(s) of _____

imposed on the above service member on _____ (is) (are) set aside on the basis that _____ *(date of punishment)*

All rights, privileges, and property affected are hereby restored.

5. VACATION OF SUSPENSION

a. The suspension of the punishment(~~s~~) of reduction to Private First Class (E3)

imposed on the above service member on 7 Sep 97 (is) (~~are~~) hereby vacated. The unexecuted portion(~~s~~) of the punishment(~~s~~) will be duly executed. *(date of punishment)*

b. Vacation is based on the following offense(~~s~~): At Fort Blank, VA, on or about 0600 hours, 15 Sep 97, SP4 Robert L. Ager, did, without authority, fail to go at the time prescribed to his appointed place of duty, to wit: Formation, Co D, 1/5 Inf, in front of Building 13. This is in violation of Article 86, UCMJ.

c. The member *(was)* (~~was not~~) given an opportunity to rebut *(para 3-36, AR 27-10)*.

d. The member *(was)* (~~was not~~) present at the vacation proceeding *(para 3-36, AR 27-10)*.

ORIGINAL DA FORM 2627 *(Check appropriate box)* N/A

[ ] DIRECTED FOR FILING IN THE [ ] PERFORMANCE [ ] RESTRICTED PORTION OF THE OMPF

AUTHENTICATION *(Check appropriate boxes)*

[XX] BY MY ORDER: [XX] THE OFFICER WHO IMPOSED THE PUNISHMENT
[ ] THE SUCCESSOR IN COMMAND TO THE IMPOSING COMMANDER [ ] AS SUPERIOR AUTHORITY

DATE	NAME, GRADE, AND ORGANIZATION OF COMMANDER	SIGNATURE
16 Sep 97	JAMES A. SMITH, CPT, Co D, 1/5 Inf	James A. Smith

DA FORM 2627-2 FEB 83 EDITION OF NOV 82 WILL BE USED UNTIL EXHAUSTED.

Figure 3–3. DA Form 2627–2 illustrated

DAJA-CL
25 August 1987

INFORMATION PAPER

SUBJECT: Reporting Article 15s to the NCIC

1. Purpose. To advise conferees on a new DOD IG requirement to report certain criminal history information to the National Criminal Information Center (NCIC).

2. Facts.

a. DOD IG Memorandum Number 10, "Criminal History Reporting Requirements", dated 25 March 1987, requires reporting data to the FBI's computerized NCIC if:

(1) CID (rather than MPI) investigates the offense,

(2) the offense is one of the serious offenses (generally subject to punishment by one or more years of confinement) listed at enclosure 1, and

(3) disciplinary action (whether court-martial or Art. 15) is initiated.

This policy becomes effective 1 October 1987.

b. CID is tasked with reporting initial information at the initiation of disciplinary action and ultimate disposition information to include any exculpatory appellate action. CID has published a memorandum dated 21 July 1987, implementing the DOD memo of the same subject. Disposition information, particularly appeals on affected Art. 15s, will have new significance and require close coordination to ensure fairness.

c. Designating restricted fiche filing of an Art. 15 will not prevent data being reported to the NCIC if the conditions in para. a, above, are present. This may be of importance to commanders as well as accused in officer and senior NCO cases.

LTC Canner/51893

OFFENSES UNDER THE UCMJ WHICH MUST BE REPORTED BY FD FORM 249.

This enclosures lists those offenses under the UCMJ the titling for which (together with initiation of military judicial or nonjudicial action) requires the forwarding of a Criminal History Fingerprint Card (FD Form 249) to the FBI.

Article	Specific Offense
78	Accessory after the fact to other offenses listed in this enclosure.
80	Attempts to commit other offenses listed in this enclosure
81	Conspiracy to commit other offenses listed in this enclosure.
106a	Espionage
107	False official statements
108	Military property, selling or otherwise wrongfully disposing of. Military property willfully damaging, destroying, losing or suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, of a value of more than $100.00 or any firearm, explosive, or incendiary device.
112a	Wrongful use, possession, etc. of controlled substances.
118	Murder
119	Manslaughter
120	Rape, carnal knowledge
121	Larceny of property of a value of more than $100.00, or of an aircraft, vessel, or vehicle.
122	Robbery
123	Forgery
124	Maiming
125	Sodomy
126	Arson
127	Extortion

Encl 1

128	Assault upon, in execution of office, person serving as sentinel, lookout, security policeman, military policeman, shore patrol, master at arms, or civil law enforcement officer.
	Assault with dangerous weapon or means likely to produce grievous bodily harm or death.
129	Burglary
130	Housebreaking
131	Perjury
132	Frauds against the United States under Article 132(1) or (2)
	Frauds against the United States under Article 132(3) or (4) involving more than $100.00
134	Assault, indecent
	Assault with intent to commit murder, rape, voluntary manslaughter, robbery, sodomy, arson, or burglary
	Bomb threat or hoak
	Bribery
	Burning with intent to defraud
	Correctional custody, escape from
	False pretenses, obtaining services under, of a value of more than $100.00
	False swearing
	Firearm, discharging wrongfully so as to endanger human life
	Graft
	Homicide, negligent
	Indecent act or liberties with a child
	Indecent acts with another
	Kidnapping

Mail, taking, opening, secreting, destroying or stealing

Mails, depositing or causing to be deposited obscene matter in

Misprision of a serious offense (felony)

Obstructing justice

Pandering

Property, destruction, removal, or disposal of to prevent seizure

Prostitution

Perjury, subornation of

Public record, altering, concealing, removing, mutilating, obliterating, or destroying

Stolen property, knowingly receiving, buying, or concealing, of a value of $100.00 or more

Threat, communicating

Weapon, concealed, carrying

Offenses under the federal Assimilative Crimes Act (18 USC 13) charged as a violation of Article 134, UCMJ, which has a maximum

Figure 2–1. Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes—Continued

b. The Department of Defense will provide assistance to the Department of Justice in matters not relating to the Department of Defense as permitted by law and implementing regulations.

6. Joint Investigations.

a. To the extent authorized by law, the Department of Justice investigative agencies and the Department of Defense investigative agencies may agree to enter into joint investigative endeavors, including undercover operations, in appropriate circumstances. However, all such investigations will be subject to Department of Justice guidelines.

b. The Department of Defense, in the conduct of any investigation that might lead to prosecution in Federal District Court, will conduct the investigation consistent with any Department of Justice guidelines. The Department of Justice shall provide copies of all relevant guidelines and their revisions.

DOD Supplemental Guidance

When DoD procedures concerning apprehension, search and seizure, interrogation, eyewitnesses, or identification differ from those of DoJ, DOD procedures will be used, unless the DoJ prosecutor has directed that DoJ procedures be used instead. DOD criminal investigators should bring to the attention of the DoJ prosecutor, as appropriate, situations when use of DoJ procedures might impede or preclude prosecution under the UCMJ (reference(d)).

7. Apprehension of Suspects. To the extent authorized by law, the Department of Justice and the Department of Defense will each promptly deliver or make available to the other suspects, accused individuals and witnesses where authority to investigate the crimes involved is lodged in the other Department. This MOU neither expands nor limits the authority of either Department to perform apprehensions, searches, seizures, or custodial interrogations.

G. Exception

This Memorandum shall not affect the investigative authority now fixed by the 1979 "Agreement Governing the Conduct of the Defense Department Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation" and the 1983 Memorandum of Understanding between the Department of Defense, the Department of Justice and the FBI concerning "Use of Federal Military Force in Domestic Terrorist Incidents."

Chapter 3
Nonjudicial Punishment

Section I
Applicable Policies (para 1, Part V, MCM)

3–1. General

This chapter implements and amplifies Article 15, UCMJ, and Part V, MCM. No action should be taken under the authority of Article 15, UCMJ, without referring to the appropriate provisions of the MCM and this chapter. This chapter prescribes requirements, policies, limitations, and procedures for—

a. Commanders at all levels imposing nonjudicial punishment.

b. Members on whom this punishment is to be imposed.

c. Other persons who may take some action with respect to the proceedings.

3–2. Use of nonjudicial punishment

A commander should use nonpunitive measures to the fullest extent to further the efficiency of the command before resorting to nonjudicial punishment (para 1d(1), Part V, MCM). Use of nonjudicial punishment is proper in all cases involving minor offenses in which nonpunitive measures are considered inadequate or inappropriate. If it is clear that nonjudicial punishment will not be sufficient to meet the ends of justice, more stringent measures must be taken. Prompt action is essential for nonjudicial punishment to have the proper corrective effect. Nonjudicial punishment may be imposed to—

a. Correct, educate, and reform offenders who the imposing commander determines cannot benefit from less stringent measures.

b. Preserve a soldier's record of service from unnecessary stigma by record of court-martial conviction.

c. Further military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial.

3–3. Relationship of nonjudicial punishment to nonpunitive measures (para 1g, Part V, MCM)

a. General. Nonjudicial punishment is imposed to correct misconduct in violation of the UCMJ. Such conduct may result from intentional disregard of or failure to comply with prescribed standards of military conduct. Nonpunitive measures usually deal with misconduct resulting from simple neglect, forgetfulness, laziness, inattention to instructions, sloppy habits, immaturity, difficulty in adjusting to disciplined military life, and similar deficiencies. These measures are primarily tools for teaching proper standards of conduct and performance and do not constitute punishment. Included among nonpunitive measures are: denial of pass or other privileges, counseling, administrative reduction in grade, administrative reprimands and admonitions, extra training (AR 600–20), bar to reenlistment, and MOS reclassification. Certain commanders may administratively reduce enlisted personnel for inefficiency and other reasons. This authority exists apart from any authority to punish misconduct under Article 15. These two separate and distinct kinds of authority should not be confused (AR 600–200).

b. Reprimands and admonitions.

(1) Commanding officers have authority to give admonitions or reprimands either as an administrative measure or as nonjudicial punishment. If imposed as a punitive measure under Article 15, the procedure set forth in paragraph 4, Part V, MCM, and in section III of this chapter must be followed.

(2) A written administrative admonition or reprimand will contain a statement that it has been imposed as an administrative measure and not as punishment under Article 15 (AR 600–37). Admonitions and reprimands imposed as punishment under Article 15, whether administered orally or in writing (para 5c(1), Part V, MCM), should state clearly that they were imposed as punishment under that Article.

c. Extra training or instruction. One of the most effective nonpunitive measures available to a commander is extra training or instruction (AR 600–20). It is used when a soldier's duty performance has been substandard or deficient; for example, a soldier who fails to maintain proper attire may be required to attend classes on the wearing of the uniform and stand inspection until the deficiency is corrected. The training or instruction must relate directly to the deficiency observed and must be oriented to correct that particular deficiency. Extra training or instruction may be conducted after duty hours.

3–4. Personal exercise of discretion (para 1d(2), Part V, MCM)

a. A commander will personally exercise discretion in the nonjudicial punishment process by—

(1) Evaluating the case to determine whether proceedings under Article 15 should be initiated.

(2) Determining whether the soldier committed the offense(s) where Article 15 proceedings are initiated and the soldier does not demand trial by court-martial.

(3) Determining the amount and nature of any punishment, if punishment is appropriate.

b. No superior may direct that a subordinate authority impose punishment under Article 15 or issue regulations, orders, or so-

called "guides" that either directly or indirectly suggest to subordinate commanders that—

(1) Certain categories of offenders or offenses should be disposed of by punishment under Article 15.

(2) Predetermined kinds or amounts of punishment should be imposed for certain categories of offenders or offenses.

c. A superior commander may send or return a case to a subordinate for appropriate disposition if necessary and within the jurisdiction of the subordinate. A superior commander may also reserve personally, or to the superior commander's delegate, the right to exercise Article 15 authority over a particular case or over certain categories of offenders or offenses (para 3–7c).

3–5. Reference to superior

a. See R.C.M. 306(b). Nonjudicial punishment should be administered at the lowest level of command commensurate with the needs of discipline, after thoroughly considering—

(1) The nature and circumstances of the offense.

(2) The age, previous record, maturity, and experience of the offender.

b. If a commander determines that the commander's authority under Article 15 is insufficient to impose a proper punishment, the case may be referred to an appropriate superior. The same procedure will be followed if the authority of the commander to exercise Article 15 powers has been withheld or limited (paras 3—4 and 3–7c). In transmitting a case for action by a superior, no recommendation of the nature or extent of the punishment to be imposed will be made. Transmittal should normally be accomplished by written correspondence using DA Form 5109–R (Request to Superior to Exercise Article 15, UCMJ, Jurisdiction). DA Form 5109–R will be locally reproduced on 8½- by 11-inch paper. A copy for reproduction is located at the back of this regulation.

3–6. Filing determination

a. A commander's decision whether to file a record of nonjudicial punishment on the performance fiche of a soldier's Official Military Personnel File (OMPF) is as important as the decision relating to the imposition of nonjudicial punishment itself. In making a filing determination, the imposing commander must weigh carefully the interests of the soldier's career against those of the Army to produce and advance only the most qualified personnel for positions of leadership, trust, and responsibility. In this regard, the imposing commander should consider the soldier's age, grade, total service (with particular attention to the soldier's recent performance and past misconduct), and the fact that the filing decision is final, except for those cases where the soldier has more than one record of nonjudicial punishment directed for filing in the restricted fiche (see *b* below). However, the interests of the Army are compelling when the record of nonjudicial punishment reflects unmitigated moral turpitude or lack of integrity, patterns of misconduct, or evidence of serious character deficiency or substantial breach of military discipline. In such cases, the record should be filed in the performance fiche.

b. If a record of nonjudicial punishment has been designated for filing in a soldier's restricted fiche, the soldier's OMPF will be reviewed to determine if the restricted fiche contains a previous record of nonjudicial punishment. In those cases where a previous DA Form 2627 (Record of Proceedings under Article 15, UCMJ), which has not been wholly set aside, has been filed in the restricted fiche, and the soldier, prior to that punishment, was in the grade of SGT or higher, the present DA Form 2627 will be filed in the performance fiche. The filing should be recorded on the present DA 2627 in block 11. The soldier concerned and the imposing commander will be informed of the filing of the DA Form 2627 in the performance fiche. The copy of the DA Form 2627 that was placed in the unit files will be moved to the soldier's MPRJ.

Section II
Authority (para 2, Part V, MCM)

3–7. Who may impose nonjudicial punishment

a. Commanders. Unless otherwise specified in this regulation or if authority to impose nonjudicial punishment has been limited or withheld by a superior commander (see *c* below), any commander authorized to exercise the disciplinary powers conferred by Article 15.

(1) The term "commander," as used in this chapter, means a commissioned or warrant officer who, by virtue of that officer's grade and assignment, exercises primary command authority over a military organization or prescribed territorial area, that under pertinent official directives is recognized as a command.

(2) The term imposing commander refers to the commander or other officer who actually imposes the nonjudicial punishment.

(3) Commands include the following:

(a) Companies, troops, and batteries.

(b) Numbered units and detachments.

(c) Missions.

(d) Army elements of unified commands and joint task forces.

(e) Service schools.

(f) Area commands.

(4) Commands also include, in general, any other organization of the kind mentioned in (1) above (for example, a provisional unit designated under AR 220–5), the commander of which is the one looked to by superior authority as the individual chiefly responsible for maintaining discipline in that organization. Thus, an infantry company, whether or not separate or detached (R.C.M. 504(b)(2)), is considered to be a command. However, an infantry platoon that is part of a company and is not separate or detached is not considered to be a command. Although a commissioned or warrant officer exercising command is usually designated as the commander, this position may be designated by various other titles having the same official connotation; for example, commandant, chief of mission, or superintendent. Whether an officer is a commander is determined by the duties he or she performs, not necessarily by the title of the position occupied.

b. Delegation. The authority given to a commander under Article 15 is an attribute of command and, except as provided in this paragraph, may not be delegated. Pursuant to the authority vested in the Secretary the Army under the provisions of Article 15(a), UCMJ, the following rules with respect to delegation of powers are announced:

(1) Any commander authorized to exercise GCM jurisdiction or any commanding general may delegate that commander's or commanding general's powers under Article 15 to one commissioned officer actually exercising the function of deputy or assistant commander. A commander may, in lieu of delegating powers under Article 15 to a deputy or assistant commander, delegate such powers to the chief of staff of the command, provided the chief of staff is a general officer.

(2) Authority delegated under b(1) above may be exercised only when the delegate is senior in grade to the person punished. A delegate need not, when acting as a superior authority on an appeal, be senior in grade to the imposing commander.

(3) Delegations of authority to exercise Article 15 powers will be made in writing; for example, a memorandum. It will designate the officer on whom the powers are conferred by name and position. Unless limited by the terms of such delegation or by (2) above, an officer to whom this authority is granted may exercise any power that is possessed by the officer who delegated the authority. Unless otherwise specified in the written authorization, a delegation of Article 15 authority shall remain effective until—

(a) The officer who delegated the officer's powers ceases to occupy that position, other than because of temporary absence;

(b) The officer to whom these powers have been delegated ceases to occupy the position wherein the officer was delegated such powers, other than because of temporary absence; or

(c) Notification that the delegation has been terminated is made in writing. A delegation does not divest the delegating officer of the

right to personally exercise the delegating officer's Article 15 powers in any case in which the delegating officer desires to act. Although an appeal from punishment imposed under a delegation of Article 15 powers will be acted on by the authority next superior to the delegating officer (para 3–30), the latter may take the action described in paragraph 3–32. (See paras 6 and 7, Part V, MCM, and para 3–38 of this regulation.)

c. Limitation of exercise of disciplinary authority by subordinates. Any commander having authority under Article 15, UCMJ, may limit or withhold the exercise of such authority by subordinate commanders. For example, the powers of subordinate commanders to exercise Article 15 authority over certain categories of military personnel, offenses, or individual cases may be reserved by a superior commander. A superior authority may limit or withhold any power that a subordinate might otherwise have under this paragraph.

3–8. Persons on whom nonjudicial punishment may be imposed

a. Military personnel of a commander's command. Unless such authority is limited or withheld by superior competent authority, a commander may impose punishment under Article 15 on commissioned officers, warrant officers, and other military personnel of a commander's command, except cadets of the U.S. Military Academy.

(1) For the purpose of Article 15, military personnel are considered to be "of the command" of a commander if they are—

(a) Assigned to an organization commanded by that commander.

(b) Affiliated with the command (by attachment, detail, or otherwise) under conditions, either expressed or implied, that indicate that the commander of the unit to which affiliated and the commander of the unit to which they are assigned are to exercise administrative or disciplinary authority over them.

(2) Under similar circumstances, a commander may be assigned territorial command responsibility so that all or certain military personnel in the area will be considered to be of the command for the purpose of Article 15

(3) To determine if an individual is "of the command" of a particular commanding officer, refer first to those written or oral orders or directives that affect the status of the individual. If orders or directives do not expressly confer authority to administer nonjudicial punishment to the commander of the unit with which the soldier is affiliated or present (as when, for example, they contain no provision attaching the soldier "for disciplinary purposes"), consider all attendant circumstances, such as—

(a) The phraseology used in the orders.

(b) Where the soldier slept, ate, was paid, performed duty, the duration of the status, and other similar factors.

(4) If orders or directives include such terms as "attached for administration of military justice," or simply "attached for administration," the individual so attached will be considered to be of the command of the commander of the unit of attachment for the purpose of Article 15.

b. Termination of status. Nonjudicial punishment will not be imposed on an individual by a commander after the individual ceases to be of the commander's command, because of transfer or otherwise. However, if Article 15 proceedings have been instituted and punishment has not been imposed prior to the time of the change of assignment, the commander who instituted the proceedings may forward the record of proceedings to the gaining commander for appropriate disposition.

c. Personnel of other armed forces. Except when commanding a unified command, specified command, joint command, joint task force, or subordinate commands thereof (under conditions prescribed by applicable law, executive order, or superior authority), or when authorized by the Secretary of Defense, Army officers will not impose nonjudicial punishment on a member of another armed force.

3–9. Minor offenses

Generally, the term "minor" includes misconduct not involving any greater degree of criminality than is involved in the average offense tried by SCM. It does not include misconduct of a type that, if tried by GCM, could be punished by dishonorable discharge or confinement for more than 1 year (see para 1e, Part V, MCM). This is not a hard and fast rule; the circumstances of the offense might indicate that action under Article 15 would be appropriate even in a case falling outside these categories. Violations of, or failures to obey general orders or regulations may be minor offenses if the prohibited conduct itself is of a minor nature even though also prohibited by a general order or regulation.

3–10. Double punishment prohibited

Several minor offenses arising out of substantially the same transaction or misconduct will not be made the basis of separate actions under Article 15, UCMJ. When punishment has been imposed under Articles 13 or 15, punishment may not again be imposed for the same misconduct under Article 15.

3–11. Restriction on punishment after exercise of jurisdiction by civilian authorities

3–12. Statute of limitations

See UCMJ, Article 43(c), and paragraph 1f(4), Part V, MCM, regarding the statute of limitations applicable to nonjudicial punishment.

Section III
Procedure (para 4, Part V, MCM)

3–13. General

The authority to impose nonjudicial punishment charges a commander with the responsibility of exercising the commander's authority in an absolutely fair and judicious manner. (See also para 1d, Part V, MCM.)

3–14. Preliminary inquiry

a. The commander of the alleged offender must ensure that the matter is investigated promptly and adequately . The investigation should provide the commander with sufficient information to make an appropriate disposition of the incident. The investigation should cover—

(1) Whether an offense was committed.

(2) Whether the soldier was involved.

(3) The character and military record of the soldier.

b. Usually the preliminary investigation is informal and consists of interviews with witnesses and/or review of police or other informative reports. If, after the preliminary inquiry, the commander determines, based on the evidence currently available, that the soldier probably has committed an offense and that a nonjudicial punishment procedure is appropriate, the commander should (unless the case is to be referred to a superior commander (para 3–5)) take action as set forth in this section.

3–15. Commander's guide for notification and imposition

In all cases, other than summarized proceedings, commanders should use appendix B of this regulation as a guide in conducting the proceedings.

3–16. Summarized proceedings

a. Preliminary inquiry.

(1) A commander, after a preliminary inquiry into an alleged offense by an enlisted soldier may use summarized proceedings if it is determined that should punishment be found to be appropriate, it should not exceed—

(a) Extra duties for 14 days.

(b) Restriction for 14 days.

(c) Oral reprimand or admonition.

(d) Any combination of the above.

(2) DA Form 2627–1 (Summarized Record of Proceedings Under Article 15, UCMJ) will be used to record the proceedings. An illustrated example of a completed DA Form 2627–1 is shown at figure 3–1. The rules and limitations concerning punishments in section IV and provisions regarding clemency in section V are applicable.

b. Notification and explanation of rights. If an imposing commander determines that summarized proceedings are appropriate, the designated subordinate officer or noncommissioned officer (NCO) (para 3–18), or the commander personally, will notify the soldier of the following:

(1) The imposing commander's intent to initiate proceedings under Article 15, UCMJ.

(2) The fact that the imposing commander intends to use summarized proceedings and the maximum punishments imposable under these proceedings.

(3) The right to remain silent.

(4) Offenses that the soldier allegedly has committed and the Article(s) of the UCMJ violated.

(5) The right to demand trial (see para 4a(5), Part V, MCM).

(6) The right to confront witnesses, examine the evidence, and submit matters in defense, extenuation, and/or mitigation.

(7) The right to appeal.

c. Decision period. The soldier will be given the opportunity to—

(1) Accept the Article 15.

(2) Request a reasonable time, normally 24 hours, to decide whether to demand trial by court-martial and to gather matters in defense, extenuation, and/or mitigation. Because of the limited nature of the possible punishment, the soldier has no right to consult with legally qualified counsel.

d. Hearing. Unless the soldier demands trial by court-martial within the decision period, the imposing commander may proceed with the hearing (see para 3–18g(1)). The hearing will consist of the following:

(1) Consideration of evidence, written or oral, against the soldier.

(2) Examination of available evidence by the soldier.

(3) Presentation by the soldier of testimony of available witnesses or other matters, in defense, extenuation, and/or mitigation.

(4) Determination of guilt or innocence by the imposing commander.

(5) Imposition of punishment or termination of the proceedings.

(6) Explanation of right to appeal.

e. Appeal. The appeal and the decision on appeal will be recorded in block 5, DA Form 2627–1. This will be done according to the procedures set forth in paragraph 3–32. The soldier will be given a reasonable time (normally no more than 5 calendar days) within which to submit an appeal (see para 3–29). The soldier may, pending submission and decision on the appeal, be required to undergo the punishment imposed, but once submitted, such appeal will be promptly decided. If the appeal is not decided within 3 calendar days, excluding the day of submission, and if the soldier so requests, further performance of any punishments involving deprivation of liberty will be delayed pending the decision on the appeal (see sec IV).

f. Recording and filing of DA Form 2627–1. The proceedings will be legibly summarized on DA Form 2627–1, ordinarily with handwritten entries. These forms will be maintained locally in nonjudicial punishment files (file number 27–10f). They will be destroyed at the end of 2 years from the date of imposition of punishment or on the soldier's transfer from the unit, whichever occurs first. A copy will be provided to the soldier pursuant to a request submitted during the filing period.

3–17. Formal proceedings (para 4, Part V, MCM)

A commander who, after a preliminary inquiry, determines—

a. That the soldier alleged to have committed an offense is an officer, or

b. That punishment, if it should prove to be appropriate, might exceed extra duties for 14 days, restriction for 14 days, oral reprimand on admonition, or any combination thereof, will proceed as set forth below. All entries will be recorded on DA Form 2627 (Record of Proceedings under Article 15, UCMJ). An illustrated example of a completed DA Form 2627 is shown at figure 3–2.

3–18. Notification and explanation of rights

a. General. The imposing commander will ensure that the soldier is notified of the commander's intention to dispose of the matter under the provisions of Article 15, UCMJ. The soldier will also be notified of the maximum punishment which the commander could impose under Article 15, UCMJ. The soldier will be provided a copy of DA Form 2627 with items 1 and 2 completed, including the date and signature of the imposing commander. The imposing commander may authorize a commissioned officer, warrant officer, or NCO (SFC or above), provided such person is senior to the soldier being notified, to deliver the DA Form 2627 and inform the soldier of the soldier's rights. The NCO performing the notification should ordinarily be the unit first sergeant or the senior NCO of the command concerned. In such cases, the notifier should follow appendix B as modified. The soldier should be provided with a copy of DA Form 2627 and supporting documents and statements, for use during the proceedings. The soldier will return the copy to the commander for annotation. It will be given to the soldier for retention when all proceedings are completed.

b. Right to remain silent. The soldier will be informed that—

(1) The soldier is not required to make any statement regarding the offense or offenses of which the soldier is suspected, and

(2) Any statement made may be used against the soldier in the Article 15 proceedings or in any other proceedings, including a trial by court-martial.

c. Right to counsel. The soldier will be informed of the right to consult with counsel and the location of counsel. For the purpose of this chapter, counsel means the following: A judge advocate (JA), a DA civilian attorney, or an officer who is a member of the bar of a Federal court or of the highest court of a State, provided that counsel within the last two categories are acting under the supervision of either USATDS or a staff or command judge advocate.

d. Right to demand trial. Soldiers attached to or embarked in a vessel may not demand trial by court-martial in lieu of nonjudicial punishment. Any other soldier will be advised that the soldier has a right to demand trial. The demand for trial may be made at any time prior to imposition of punishment. The soldier will be told that if the soldier demands trial, trial could be by SCM, SPCM, or GCM. The soldier will also be told that the soldier may object to trial by summary court-martial (SCM) and that at special court-martial (SPCM) or general court-martial (GCM) the soldier would be entitled to be represented by qualified military counsel, or by civilian counsel obtained at no government expense.

e. Other rights. The soldier will be informed of the right to—

(1) Fully present the soldier's case in the presence, except in rare circumstances, of the imposing commander (para 3–18g).

(2) Call witnesses. (See para 4c(1)(F), Part V, MCM).

(3) Present evidence.

(4) Request that the soldier be accompanied by a spokesperson.

(5) Request an open hearing (para 3–18g).

(6) Examine available evidence.

f. Decision period.

(1) If the soldier requests a decision period, the soldier will be given a reasonable time to consult with counsel, including time off from duty, if necessary, to decide whether or not to demand trial. The decision period will not begin until the soldier has received actual notice and explanation of rights under Article 15 and has been provided a copy of DA Form 2627 with items 1 and 2 completed (see para 3–18a). The soldier will be advised that if the soldier demands a trial, block 3a of DA Form 2627 must be initialed and item 3 must be signed and dated within the decision period; otherwise the commander will proceed under Article 15. The decision period should be determined after considering factors such as the complexity of the case and the availability of counsel. Normally, 48 hours is

a reasonable decision period. If the soldier does not request a delay, the commander may continue with the proceedings immediately. If the soldier requests a delay, the soldier may, but only for good reason, be allowed an additional period to be determined by the imposing commander to decide whether to demand trial. If a new imposing commander takes command after a soldier has been notified of the original imposing commander's intent to impose punishment, the soldier will be notified of the change. The soldier shall again be given a reasonable decision period in which to consult with counsel. In either case, item 11, DA Form 2627, will contain the following: "Para 3–18f(1), AR 27–10 complied with."

(2) Prior to deciding whether to demand trial, the soldier is not entitled to be informed of the type or amount of punishment the soldier will receive if nonjudicial punishment ultimately is imposed. The soldier will be informed of the maximum punishment that may be imposed under Article 15 and, on the soldier's request, of the maximum punishment that can be adjudged by court-martial on conviction of the offense(s) involved.

(3) If the soldier demands trial by court-martial on any offense, no further action will be taken to impose nonjudicial punishment for that offense unless the soldier's demand is voluntarily withdrawn. Whether court-martial charges will be preferred against the soldier for the remaining offense(s) and the level of court-martial selected will be resolved by the appropriate commander. A soldier's demand for trial by court-martial will not bar disposition of minor offenses by nonpunitive measures by the appropriate commander.

(4) If the soldier does not demand trial by court-martial prior to expiration of the decision period, including any extension of time, the imposing commander may continue the proceedings. The imposing commander also may continue the proceedings if the soldier, even though demanding trial, refuses to complete or sign item 3, DA Form 2627, within the prescribed time. In such instances, the soldier will be informed that failure to complete and sign item 3 may be treated as a voluntary withdrawal of any oral demand for trial. If the soldier persists in the soldier's refusal and punishment is imposed, in addition to recording the punishment, the following entry will be made in item 4, DA Form 2627: "Advised of (his) (her) rights, the soldier (did not demand trial during the decision period) (refused to (complete) (sign) item 3)."

g. Hearing.

(1) In the presence of the commander. The soldier will be allowed to personally present matters in defense, extenuation, or mitigation in the presence of the imposing commander, except when appearance is prevented by the unavailability of the commander or by extraordinary circumstances (for example, the soldier is stationed at a geographic location remote from that of the imposing commander and cannot be readily brought before the commander). When personal appearance is requested, but is not granted, the imposing commander will appoint a commissioned officer to conduct the hearing and make a written summary and recommendations. The soldier shall be entitled to appear before the officer designated to conduct the hearing. (See para 4c(1), Part V, MCM.)

(2) Open hearing. Article 15 proceedings are not adversary in nature. Ordinarily, hearings are open. However, a soldier may request an open or closed hearing. In all cases, the imposing commander will, after considering all the facts and circumstances, determine whether the hearing will be open or closed. (See para 4c(1)(G), Part V, MCM.) An open hearing is a hearing open to the public but does not require the commander to hold the proceeding in a location different from that in which the commander conducts normal business; that is, the commander's office.

h. Spokesperson. The person who may accompany the soldier to the Article 15 proceeding and who speaks on the soldier's behalf need not be a lawyer. An offender has no right to legal counsel at the nonjudicial proceedings. The soldier may retain civilian counsel to act as the soldier's spokesperson at no cost to the Government. However, the commander need not grant a delay for the appearance of any spokesperson, to include, civilian counsel so retained. No travel fees nor any other costs may be incurred at Government expense for the presence of the spokesperson. The spokesperson's presence is voluntary. Because the proceedings are not adversary in nature, neither the soldier nor spokesperson (including any attorney present on behalf of the soldier) may examine or cross-examine witnesses, unless permitted by the imposing commander. The soldier or spokesperson may, however, indicate to the imposing commander relevant issues or questions they wish to explore or ask.

i. Witnesses. The soldier's request for witnesses in defense, extenuation, or mitigation shall be restricted to those witnesses reasonably available as determined by the imposing commander. To determine whether a witness is reasonably available, the imposing commander will consider the fact that neither witness nor transportation fees are authorized. Reasonably available witnesses will ordinarily include only personnel at the installation concerned and others whose attendance will not unnecessarily delay the proceedings.

j. Evidence. The imposing commander is not bound by the formal rules of evidence before courts–martial and may consider any matter, including unsworn statements, the commander reasonably believes to be relevant to the offense.

k. Action terminating proceedings. If, after evaluation of all pertinent matters, the imposing commander determines that nonjudicial punishment is not warranted, the soldier will be notified that the proceedings have been terminated and all copies of DA Form 2627 will be destroyed.

l. Imposition of punishment. Punishment will not be imposed unless the commander is convinced beyond a reasonable doubt that the soldier committed the offense(s). If the imposing commander decides to impose punishment, ordinarily the commander will announce the punishment to the soldier. The commander may, if the commander desires to do so, explain to the soldier why a particular punishment was imposed.

m. Right to appeal. The appellate rights and procedures, which are available to the soldier, will be explained.

Section IV
Punishment (para 5, Part V, MCM)

3–19. Rules and limitations

a. Whether to impose punishment and the nature of the punishment are the sole decisions of the imposing commander. However, commanders are encouraged to consult with their NCOs on the appropriate type, duration, and limits of punishment to be imposed. Additionally, as NCOs are often in the best position to observe a soldier undergoing punishment and evaluate daily performance and attitude, their views on clemency should be given careful consideration.

b. Pursuant to the authority of the Secretary as set forth in paragraph 5a, Part V, MCM, the following additional rules and limitations concerning the kinds and amounts of punishment authorized under Article 15, UCM (see also table 3–1):

(1) *Correctional custody.* Correctional custody may be imposed by any commander unless the authority to impose has been withheld or limited by a superior authority. The responsibilities, policies, and procedures concerning the operation of correctional custody facilities are contained in AR 190–34. Soldiers in grades PFC or above may not be placed in correctional custody. However, if an unsuspended reduction to the grade of PFC or below is imposed under an Article 15, correctional custody may also be imposed. Time spent in correctional custody does not constitute lost time (10 USC 972). Before imposing correctional custody the commander will ensure that adequate facilities, as described in AR 190–34, exist to carry out the punishment.

(2) *Confinement on bread and water or diminished rations.* This punishment may be imposed only on a soldier in the grade of PFC or below who is attached to or embarked on a vessel.

(3) *Restriction.* Restriction may be imposed with or without suspension from duties. Normally, the limits of the restriction should be announced at the time punishment is imposed. However, the imposing commander, a successor–in–command, and any superior authority may change the specified limits of restriction; for example, if a soldier is transferred or assigned duties at another location after

imposition and before the term of restriction is completed. The limits of restriction, as changed, will be generally no more restrictive (unless required by military exigencies) than the limits originally imposed.

(4) *Arrest in quarters.* A commissioned or warrant officer undergoing this punishment may be required to perform any military duty not involving the exercise of command. During field exercises, an officer's quarters are those normally occupied by officers of a similar grade and duty position. If a commissioned or warrant officer in arrest in quarters is placed on duty involving the exercise of command by an authority having knowledge of the status of arrest in quarters, that status is thereby terminated.

(5) *Extra duties.* Extra duties may be required to be performed at anytime and, within the duration of the punishment, for any length of time. Extra duties may include the performance of fatigue duty or of any other military duty. No extra duty may be imposed that—

(a) Constitutes cruel or unusual punishment or a punishment not sanctioned by the customs of the service; for example, using the offender as a personal servant.

(b) Is a duty normally intended as an honor, such as assignment to a guard of honor.

(c) Is required to be performed in a ridiculous or unnecessarily degrading manner; for example, an order to clean a barracks floor with a toothbrush.

(d) Constitutes a safety or health hazard to the offender, or

(e) Would demean the soldier's position as a NCO or specialist (AR 600–20).

(6) *Reduction in grade.*

(a) Promotion authority. The grade from which reduced must be within the promotion authority of the imposing commander or of any officer subordinate to the imposing commander. For the purposes of this regulation, the imposing commander or any subordinate commander has "promotion authority" within the meaning of Article 15(b) if the imposing commander has the general authority to appoint to the grade from which reduced or to any higher grade (AR 600–200).

(b) Lateral appointment or reduction of NCO to specialist and a specialist to NCO. (Rescinded.)

(c) Date of rank. When a person is reduced in grade as a result of an unsuspended reduction, the date of rank in the grade to which reduced is the date the punishment of reduction was imposed. If the reduction is suspended either on or after the time the punishment was imposed, or is set aside or mitigated to forfeiture, the date of rank in the grade held before the punishment was imposed remains unchanged. If a suspension of the reduction is vacated, the date of rank in the grade to which reduced as a result of the action is the date the punishment was originally imposed, regardless of the date the punishment was suspended or vacated.

(d) Entitlement to pay. When a soldier is restored to a higher pay grade because of a suspension or when a reduction is mitigated to a forfeiture, entitlement to pay at the higher grade is effective on the date of the suspension or mitigation. This is true even though an earlier date of rank is assigned. If, however, a reduction is set aside and all rights, privileges, and property are restored, the soldier concerned will be entitled to pay as though the reduction had never been imposed.

(e) Void reduction. Any portion of a reduction under Article 15 beyond the imposing commander's authority to reduce is void and must be set aside. Where, a commander reduces a soldier below a grade to which the commander is authorized to reduce and if the circumstances of the case indicate that the commander was authorized and intended to reduce the soldier at least one grade, a one-grade reduction may be approved. Also, if a reduction is to a lower specialist grade when reduction should have been to a lower NCO grade (or vice versa), administrative action will be taken to place the offender in the proper rank for the MOS held in the reduced pay grade. All rights, privileges, and property, including pay and allowances, of which a soldier was deprived by a reduction that has been set aside must be restored.

(f) Removal from standing promotion lists. (See AR 600–200.)

(7) *Forfeiture of pay.*

(a) Limitations. Forfeitures imposed by a company grade commander may not be applied for more than 1 month, while those imposed by a field grade commander may not be applied for more than 2 months; for example, a company grade commander may impose a forfeiture of 7 days pay for 1 month but may not impose a forfeiture of 3 days pay per month for 2 months (table 3–1). If a forfeiture of pay has been imposed in addition to a suspended or unsuspended reduction in grade, the amount forfeited will be limited to the amount authorized for the reduced grade. The maximum forfeiture of pay to which a soldier is subject during a given month, because of one or more actions under Article 15, is one–half of the soldier's pay per month. Article 15 forfeitures shall not (in conjunction with partial forfeitures adjudged by court–martial) deprive a soldier of more than two–thirds of the soldier's pay per month. (See DOD Military Pay and Allowances Entitlements Manual.)

(b) Retired soldiers. Forfeitures imposed under Article 15 may be applied against a soldier's retirement pay.

(8) *Combination and apportionment.* With the following exception, punishment authorized under Article 15(b) may be combined: No two or more punishments involving deprivation of liberty may be combined, in the same nonjudicial punishment proceedings, to run either consecutively or concurrently. Two or more punishments involving deprivation of liberty may not be combined, in the same nonjudicial punishment proceeding, to run either consecutively or concurrently, except that restriction and extra duty may be combined in any manner to run for a period not in excess of the maximum duration imposable for extra duty by the imposing commander. Once commenced, deprivation of liberty punishments will run continuously, except where temporarily interrupted due to the fault of the soldier, or the soldier is physically incapacitated, or an appeal is not acted on as prescribed in paragraph 3–21b. (See para 3–21c regarding the circumstances when deprivation of liberty punishments, imposed in separate nonjudicial punishment proceedings may run consecutively.)

(9) *Format for punishments.* The formats shown below should be used when entering punishments in item 4, DA Form 2627. When more than one punishment is imposed during any single Article 15 proceeding, punishments should be listed in the following order, as appropriate: reduction, forfeiture of pay, deprivation of liberty, admonition/reprimand.

(a) Reduction. Reduction should be entered on DA Form 2627 as follows: Reduction to (grade) (pay grade). Example: "Reduction to Specialist (E4)."

(b) Forfeitures. Forfeiture of pay should be entered on DA Form 2627 per the following examples (para 5c(8), Part V, MCM): Example A. When the forfeiture is to be applied for not more than 1 month: "Forfeiture of $ . . ." Example B. When the forfeiture is to be applied for more than 1 month: "Forfeiture of $ . . . per month for . . . months."

(c) Deprivation of liberty. Specific duties to be performed during extra duty are not normally specified on either DA Form 2627 or DA Form 2627–1. Limits on restriction may be listed on either DA Form 2627 or DA Form 2627–1 but are not required. Example 1: "Extra duty for . . . days, restriction for . . . days." Example 2: "Extra duty for . . . days, restriction to the limits of . . . for . . . days."

(d) Admonition and Reprimand. Admonitions or reprimands imposed on commissioned or warrant officers must be in writing (para 5(c)(1), Part V MCM). Admonitions or reprimands imposed on enlisted soldiers under formal proceedings may be administered orally or in writing. Written admonitions and reprimands imposed as a punitive measure under Article 15, UCMJ, will be in memorandum format, per AR 25–50, and will be listed as an attachment in item 11, DA Form 2627. Oral admonitions and reprimands will be identified as such in either item 4, DA Form 2627, or item 2, DA Form 2627–1.

3–20. Effect on appointable status

See AR 600–200 and AR 600–8–2.

3–21. Effective date and execution of punishments

a. General. The date of imposition of nonjudicial punishment is the date items 4 through 6, DA Form 2627, or items 1 through 3, DA Form 2627–1, as appropriate, are signed by the imposing commander. This action normally will be accomplished on the day punishment is imposed.

b. Unsuspended punishments. Unsuspended punishments of reduction and forfeiture of pay take effect on the date imposed. Other unsuspended punishments take effect on the date they are imposed, unless the imposing commander prescribes otherwise. In those cases where the execution of the punishment legitimately must be delayed (for example, the soldier is hospitalized, placed on quarters, authorized emergency leave or on brief period of TDY or a brief field problem) the execution of the punishment should begin immediately thereafter. Except as provided in paragraph 3–21c, the delay in execution of punishment should not exceed 30 days. Once the soldier has submitted an appeal, including all pertinent allied documents, the appeal normally should be decided within 5 calendar days (3 days for summarized proceedings), excluding the submission date. If the appeal is not decided within this period, and if the soldier so requests, the performance of those punishments involving deprivation of liberty will be interrupted pending decision on the appeal.

c. Additional punishment. If a soldier to be punished is currently undergoing punishment or deprivation of liberty under a prior Article 15 or court–martial, an imposing commander may prescribe additional punishment involving deprivation of liberty after completion of the earlier punishment.

d. Vacated suspended reduction. A suspended reduction, later vacated, is effective on the date the vacation is directed. (See para 3–19b(6)(c) for determination of date of rank.)

e. Execution of punishment. Any commanding officer of the person to be punished may, subject to paragraph 3–19 and any other limitations imposed by a superior authority, order the punishment to be executed in such a manner and under such supervision as the commander may direct.

3–22. Announcement of punishment

The punishment may be announced at the next unit formation after punishment is imposed or, if appealed, after the decision on the appeal. It also may be posted on the unit bulletin board. The purpose of announcing the results of punishments is to preclude perceptions of unfairness of punishment and to deter similar misconduct by other soldiers. An inconsistent or arbitrary policy should be avoided regarding the announcement of punishments that might result in the appearance of vindictiveness or favoritism. In deciding whether to announce punishment of soldiers in the grade of SGT or above, the following should be considered:

a. The nature of the offense.

b. The individual's military record and duty position.

c. The deterrent effect.

d. The impact on unit morale or mission.

e. The impact on the victim.

f. The impact on the leadership effectiveness of the individual concerned.

Section V
Suspension, Vacation, Mitigation, Remission, and Setting Aside (para 6, Part V, MCM)

3–23. Clemency

a. General. The imposing commander, a successor-in-command, or the next superior authority may, in accordance with the time prescribed in the MCM—

(1) Remit or mitigate any part or amount of the unexecuted portion of the punishment imposed.

(2) Mitigate reduction in grade, whether executed or unexecuted, to forfeiture of pay.

(3) At any time, suspend probationally any part or amount of the unexecuted portion of the punishment imposed.

(4) Suspend probationally a reduction in grade or forfeiture, whether or not executed. An uncollected forfeiture of pay shall be considered unexecuted.

b. Meaning of successor-in-command. As used in paragraph 6a, Part V, MCM, a successor-in-command is the officer who has authority to impose the same kind and amount of punishment on a soldier concerned that was initially imposed or was the result of a modification and who—

(1) Commands the unit to which the punished soldier is currently assigned or attached (see para 3–8).

(2) Is the commander succeeding to the command occupied by the imposing commander, provided the soldier still is of that command, or

(3) Is the successor to the delegate who imposed the punishment, provided the same authority has been delegated under paragraph 3–7b to that successor and the soldier is still of that command.

c. Recording of action. Any action of suspension, mitigation, remission, or setting aside (para 3–28) taken by an authority will be recorded according to notes 11 and 12, DA Form 2627, notes 9 and 10, DA Form 2627–1, or DA Form 2627–2 (Record of Supplementary Action Under Article 15, UCMJ) (para 3–38b). An illustrated example of a completed DA Form 2627–2 is shown at figure 3–3.

3–24. Suspension

Ordinarily, punishment is suspended to grant a probational period during which a soldier may show that the soldier deserves a remission of the remaining suspended punishment. An executed punishment of reduction or forfeiture may be suspended only within a period of 4 months after the date imposed. Suspension of punishment may not be for a period longer than 6 months from the suspension date. Further misconduct by the soldier, within the period of the suspension, may be grounds for vacation of the suspended portion of the punishment (para 3–25). Unless otherwise stated, an action suspending a punishment automatically includes a condition that the soldier not violate any punitive article of the UCMJ.

3–25. Vacation

a. A commander may vacate any suspended punishment, (para 6a (4), Part V, MCM), provided the punishment is of the type and amount the commander could impose and where the commander has determined that the soldier has committed misconduct (amounting to an offense under the UCMJ) during the suspension period. The commander is not bound by the formal rules of evidence before courts–martial and may consider any matter, including unsworn statements, the commander reasonably believes to be relevant to the misconduct. There is no appeal from a decision to vacate a suspension. Unless the vacation is prior to the expiration of the stated period of suspension, the suspended punishment is remitted automatically without further action. The death, discharge, or separation from service of the soldier punished prior to the expiration of the suspension automatically remits the suspended punishment. Misconduct resulting in vacation of a suspended punishment may also be the basis for the imposition of another Article 15.

b. Commanders will observe the following procedures in determining whether to vacate suspended punishments:

(1) If the suspended punishment is of the kind set forth in Article 15e(1) through (7), the soldier should, unless impracticable, be given an opportunity to appear before the officer authorized to vacate the suspension to rebut the information on which the proposed vacation is based. If appearance is impracticable, the soldier should nevertheless ordinarily be given notice of the proposed vacation and the opportunity to respond.

(2) In cases involving punishments not set forth in Article 15(e)(1) through (7), the soldier will be informed of the basis of the proposed vacation and should be given an opportunity to respond, either orally or in writing.

(3) If the soldier is absent without leave at the time the commander proposes vacation, and remains so; the commander, after 14 days from the date the soldier departed AWOL or on the last day of

the suspension period, whichever is earlier, may, at the commander's discretion, vacate the suspension without providing notice or any opportunity to respond.

(4) The following will be recorded according to notes 11 and 12, DA Form 2627, notes 9 and 10, DA Form 2627–1, or DA Form 2627–2 (para 3–38b):

(a) Action vacating a suspension, to include the basis for vacation.

(b) Whether or not the soldier appeared or was otherwise provided an opportunity to respond.

(c) An explanation, if the soldier did not appear, in a case involving vacation of a suspended punishment listed in Article 15(e)(1) through (7), or in other cases, if the soldier was not provided an opportunity to respond.

(d) Failure to provide notification and an opportunity to appear or to otherwise respond to the basis of a proposed vacation may result in the record of punishment being inadmissible in a subsequent court–martial, but will not, by itself, render a vacation action void.

3–26. Mitigation

a. General.

(1) Mitigation is a reduction in either the quantity or quality of a punishment; for example, a punishment of correctional custody for 20 days reduced to 10 days or to restriction for 20 days. The general nature of the punishment remains the same. The first action lessens the quantity and the second lessens the quality, with both mitigated punishments remaining of the same general nature as correctional custody; that is, deprivation of liberty. However, a mitigation of 10 days correctional custody to 14 days restriction would not be permitted because the quantity has been increased.

(2) A forfeiture of pay may be mitigated to a lesser forfeiture of pay. A reduction may be mitigated to forfeiture of pay (but see para 3–19b(7)(b)). When mitigating reduction to forfeiture of pay, the amount of the forfeiture imposed may not be greater than the amount that could have been imposed initially, based on the restored grade, by the officer who imposed the mitigated punishment.

b. Appropriateness. Mitigation is appropriate when—

(1) The recipient has, by the recipient's subsequent good conduct, merited a reduction in the severity of the punishment.

(2) The punishment imposed was disproportionate to the offense or the offender.

c. Limitation on mitigation.

(1) With the exception of reduction in grade, the power to mitigate exists only with respect to a punishment or portion thereof that is unexecuted. A reduction in grade may be mitigated to forfeiture of pay even though it has been executed. Except when mitigating a reduction in grade (one or more) to forfeiture of pay, a reduction of more than one grade may not be mitigated to an intermediate grade. When correctional custody or other punishments (in the nature of deprivation of liberty) are mitigated to lesser punishments of this kind, the lesser punishment may not run for a period greater than the remainder of the period for which the punishment mitigated was initially imposed. For example, when a person is given 15 days of correctional custody and has served 5 days of this punishment and it is decided to mitigate the correctional custody to extra duties or restriction, or both, the mitigated punishment may not exceed a period of 10 days.

(2) Although a suspended punishment may be mitigated to a punishment of a lesser quantity or quality (which is also suspended for a period not greater than the remainder of the period for which the punishment mitigated was suspended), it may not, unless the suspension is vacated, be mitigated to an unsuspended punishment. (See para 3–28 for the time period within which reduction ordinarily may be mitigated, if appropriate, to a forfeiture of pay.)

3–27. Remission

This is an action whereby any portion of the unexecuted punishment is canceled. Remission is appropriate under the same circumstances as mitigation. An unsuspended reduction is executed on imposition and thus cannot be remitted, but may be mitigated (see para 3–26) or set aside (see para 3–28). The death, discharge, or separation from the service of the soldier punished remits any unexecuted punishment. A soldier punished under Article 15 will not be held beyond expiration of the soldier's term of service (ETS) to complete any unexecuted punishment.

3–28. Setting aside and restoration

a. This is an action whereby the punishment or any part or amount, whether executed or unexecuted, is set aside and any rights, privileges, or property affected by the portion of the punishment set aside are restored. Nonjudicial punishment is "wholly set aside" when the commander who imposed the punishment, a successor–in–command, or a superior authority sets aside all punishment imposed upon an individual under Article 15. The basis for any set aside action is a determination that, under all the circumstances of the case, the punishment has resulted in a clear injustice. "Clear injustice" means that there exists an unwaived legal or factual error which clearly and affirmatively injured the substantial rights of the soldier. An example of "clear injustice" would be the discovery of new evidence unquestionably exculpating the soldier. "Clear injustice" does not include the fact that the soldier's performance of service has been exemplary subsequent to the punishment or that the punishment may have a future adverse effect on the retention or promotion potential of the soldier.

b. Normally, the soldier's uncorroborated sworn statement will not constitute a basis to support the setting aside of punishment.

c. In cases where administrative error results in incorrect entries on DA Form 2627 or DA Form 2627–1 the appropriate remedy generally is an administrative correction of the form and not a setting aside of the punishment.

d. The power to set aside an executed punishment and to mitigate a reduction in grade to a forfeiture of pay, absent unusual circumstances, will be exercised only within 4 months after the punishment has been executed. When a commander sets aside any portion of the punishment, the commander will record the basis for this action according to notes 11 and 12, DA Form 2627; notes 9 and 10, DA Form 2627–1, or DA Form 2627–2 (para 3–38b). When a commander sets aside any portion of the punishment after 4 months from the date punishment has been executed, a detailed addendum of the unusual circumstances found to exist will be attached to the form containing the set aside action.

Section VI
Appeals (para 7, Part V, MCM)

3–29. General

a. Only one appeal is permissible under Article 15 proceedings. Provisions for other administrative relief measures are contained in paragraph 3–43. An appeal not made within a reasonable time may be rejected as untimely by the superior authority. A reasonable time will vary according to the situation; however, an appeal (including all documentary matters) submitted more than 5 calendar days after the punishment is imposed will be presumed to be untimely, unless the superior commander, in the superior commander's sound discretion for good cause shown, determines it to be timely.

b. If, at the time of imposition of punishment, the soldier indicates a desire not to appeal, the superior authority may reject a subsequent election to appeal, even though it is made within the 5-day period. Although a suspended punishment may be appealed, no appeal is authorized from the vacation of a suspended punishment.

3–30. Who may act on an appeal

a. The authority next superior to the commanding officer who imposed the article 15 will act on an appeal if the soldier punished is still of the command of that officer at the time of appeal. If the commander has acted under a delegation of authority, the appeal will be acted on by the authority next superior to the delegating officer. If, at the time of appeal, the soldier is no longer of the imposing commander's command, the authority next superior to the soldier's present commanding officer (who can impose the same kind and amount of punishment as that imposed or resulting from subsequent modifications) will act on the appeal.

b. The authority "next superior" to an imposing commander is normally the next superior in the chain-of-command, or such other authority as may be designated by competent authority as being next superior for the purposes of Article 15. A superior authority who exercises GCM jurisdiction, or is a general officer in command, may delegate those powers the superior authority has as superior authority under Article 15(e), UCMJ, to a commissioned officer of the superior authority's command subject to the limitations in paragraph 3–7b. Regardless of the grade of the imposing commander, The Judge Advocate General is delegated the authority next superior for acting on appeals when no intermediate superior authority is reasonably available. Such appeals will be forwarded to HQDA (DAJA–CL), WASH DC 20310–2200.

3–31. Procedure for submitting an appeal

All appeals will be made on DA Form 2627 or DA Form 2627–1 and forwarded through the imposing commander or successor-in-command, when applicable, to the superior authority. The superior authority will act on the appeal unless otherwise directed by competent authority. The soldier may attach documents to the appeal for consideration. A soldier is not required to state reasons for the soldier's appeal; however, the soldier may do so. For example, the person may state the following in the appeal:

a. Based on the evidence the soldier does not believe the soldier is guilty.

b. The punishment imposed is excessive, or that a certain punishment should be mitigated or suspended.

3–32. Action by the imposing commander or the successor-in-command

The imposing commander or the successor-in-command may take any action on the appeal with respect to the punishment that the superior authority could take (para 6, Part V, MCM, and para 3–33 of this regulation). If the imposing commander or a successor-in-command suspends, mitigates, remits, or sets aside any part of the punishment, this action will be recorded according to notes 11 and 12, DA Form 2627, or notes 9 and 10, DA Form 2627–1. The appellant will be advised and asked to state whether, in view of this action, the appellant wishes to withdraw the appeal. Unless the appeal is voluntarily withdrawn, the appeal will be forwarded to the appropriate superior authority. An officer forwarding the appeal may attach any matter in rebuttal of assertions made by the soldier. When the soldier desires to appeal, the imposing commander, or the successor-in-command, will make available to the soldier reasonable assistance in preparing the appeal and will promptly forward the appeal to the appropriate superior authority.

3–33. Action by the superior authority

Action by the superior authority on appeal will be entered in item 9, DA Form 2627, or item 5, DA Form 2627–1. A superior authority will act on the appeal expeditiously. Once the soldier has submitted an appeal, including all pertinent allied documents, the appeal normally should be decided within 5 calendar days (3 days for summarized proceedings). The superior authority may conduct an independent inquiry into the case, if necessary or desirable. The superior authority may refer an appeal in any case to a JA for consideration and advice before taking action; however, the superior authority must refer an appeal from certain punishments to a JA, whether or not suspended (see note 9, DA Form 2627). In acting on an appeal, the superior authority may exercise the same powers with respect to the punishment imposed as may be exercised by the imposing commander or the imposing commander's successor-in-command. However, the superior authority cannot change a filing determination. A timely appeal does not terminate merely because a soldier is discharged from the service. It will be processed to completion by the superior authority.

3–34. Action by a judge advocate

a. When an appeal is referred to a JA, the superior authority will be advised either orally or in writing of the JA's opinion on—

(1) The appropriateness of the punishment.

(2) Whether the proceedings were conducted under law and regulations.

b. If the advice is given orally, that fact and the name of the JA who rendered the advice will be recorded in item 8, DA Form 2627.

c. The JA is not limited to an examination of written matters of the record of proceedings and may make any inquiries that are necessary.

3–35. Action by superior authority regardless of appeal

Any superior authority may exercise the same powers, except those of filing determinations (para 3–37), as may be exercised by the imposing commander, or the imposing commander's successor-in-command, whether or not an appeal has been made from the punishment (para 7f(1), Part V, MCM). "Any superior authority" has the same meaning as that given to the term "authority next superior" in paragraph 3–30, except that it also includes any authority superior to that authority. A soldier has no right to petition for relief under this paragraph and any petition so made may be summarily denied by the superior authority to whom it is addressed.

Section VII
Records of Punishment, DA Form 2627 (para 8, Part V, MCM)

3–36. Records of punishment

All Article 15 actions, including notification, acknowledgement, imposition, filing determinations, appeal, action on appeal, or any other action taken prior to action being taken on an appeal, except summarized proceedings (sec III and fig 3–1), will be recorded on DA Form 2627. The DA Form 2627 is a record of completed actions and either the DA Form 2627 or a duplicate as defined in M.R.E. 1001(4) may be considered for use at courts–martial or administrative proceedings independently of any written statements or other documentary evidence considered by an imposing commander, a successor, or a superior authority.

3–37. Distribution and filing of DA Form 2627 and allied documents

a. General. DA Form 2627 will be prepared in an original and five copies. All written statements and other documentary evidence considered by the imposing commander or the next superior authority acting on an appeal will be transmitted with the original (see g below). Copies of DA Form 2627 will be transmitted through the Military Personnel Division (MPD) or the Personnel Service Company (PSC) maintaining the Military Personnel Records Jacket (MPRJ) to the Finance and Accounting Office maintaining the soldier's pay account according to DA Pam 600–8, chapter 8. DA Form 268 (Report for Suspension of Favorable Personnel Actions) will be submitted per AR 600–8–2. Standard instructions for distribution and filing of forms for commissioned officers, warrant officers, and enlisted soldiers serving on active duty are set out below.

b. Original of DA Form 2627.

(1) Place of filing. For soldiers SPC or CPL and below (prior to punishment) the original will be filed locally in unit nonjudicial punishment files (file number 27–10f). Such locally filed originals will be destroyed at the end of 2 years from the date of imposition of punishment or on the soldier's transfer to another general courts–martial convening authority, whichever occurs first. For these soldiers, the imposing commander should annotate item 5 of DA Form 2627 as "Not Applicable (N/A)."

(a) For all other soldiers, the original will be sent to the appropriate custodian listed in (2) below for filing in the OMPF. The decision to file the original DA Form 2627 on the performance fiche or the restricted fiche in the OMPF will be determined by the imposing commander at the time punishment is imposed. The filing decision of the imposing commander is final subject only to review when a previous DA Form 2627 that has not been wholly set aside is filed in the restricted fiche. (See para 3–6b.) The imposing commander's filing decision will be indicated in item 5, DA Form 2627. A superior

authority will not limit a subordinate commander's filing determination authority. (See para 3–7c regarding the withholding authority of a superior authority in general.) When the imposing commander makes a decision regarding the filing, the imposing commander should consider the following:

(b) The performance fiche is that portion of the OMPF that is routinely used by career managers and selection boards for the purpose of assignment, promotion, and schooling selection.

(c) The restricted fiche is that portion of the OMPF that contains information not normally viewed by career managers or selection boards except as provided in AR 640–10 or specified in the Secretary of the Army's written instructions to the selection board.

(d) Records directed for filing in the restricted fiche will be redirected to the performance fiche in accordance with paragraph 3–6 if the soldier has other records of nonjudicial punishment reflecting misconduct in the grade of SGT or higher that have not been wholly set aside recorded in the restricted fiche. (See para 3–6).

(2) Mailing addresses. The original DA Form 2627 will be transmitted by the MPD/PSC to one of the following appropriate addresses—

(a) For active Army commissioned and warrant officers: HQDA (DAPC–MSP) (TAPC–MSP), ALEX VA 22332–0400 22332–0444.

(b) For USAR commissioned and warrant officers: U.S. Army Reserve Personnel Center, ATTN: DARP–PRD, 9700 Page Boulevard, St. Louis, MO 63132–5200.

(c) For ARNG commissioned and warrant officers: Chief, Army National Guard Bureau, ATTN: NGB–ARP–CO, 111 South George Mason Drive, Arlington, VA 22204–1382.

(d) For active Army enlisted soldiers: U.S. Army Enlisted Records & Evaluation Center, ATTN: PCRE–FS, Fort Benjamin Harrison, IN 46249–5301.

(e). For USAR enlisted soldiers: U.S. Army Reserve Personnel Center, ATTN: DARP–PRD, 9700 Page Boulevard, St. Louis, MO 63132–5200.

(f) For ARNG enlisted soldiers: State Adjutant General of the soldier's State, Commonwealth of Puerto Rico, Virgin Islands, or District of Columbia.

c. Copy one of DA Form 2627.

(1) For those Article 15s directed for filing on the performance fiche of the OMPF, forward to the MPD/PSC for filing in the MPRJ. Copy one will be filed in the permanent section of the MPRJ unless the original Article 15 is transferred from the performance to the restricted fiche of the OMPF. In this case, copy one will be withdrawn from the MPRJ and destroyed.

(2) For those Article 15s directed for filing on the restricted fiche of the OMPF, this copy will be filed in the unit personnel files and destroyed at the expiration of 2 years from the date of punishment or on the soldier's transfer, whichever occurs first. (See also DA Pam 600–8, chap 9, for use and preparation of DA Form 4187 (Personnel Action)).

(3) For soldiers in grades of SPC or CPL and below copy one will be destroyed. (See DA Pam 600–8, chap 9, for use and preparation of DA Form 4187.)

d. Copies two and three of DA Form 2627.

(1) Copies two and three for use as substantiating documents will be forwarded to the MPD/PSC that services the MPRJ if the punishment includes an unsuspended reduction and/or forfeiture of pay. If the punishment includes an unsuspended forfeiture of pay, the MPD/PSC will forward copy three to the Finance and Accounting Office maintaining the soldier's pay account.

(2) If all punishments affecting pay are suspended by the imposing commander, copies two and three will be retained by the unit where the punishment was imposed and destroyed on expiration of the period of suspension, unless forwarded according to paragraph 3–38 below. If the punishment, suspended or unsuspended, does not include reduction or forfeiture of pay, these copies will be destroyed.

(3) If a punishment affecting pay is suspended by a superior authority acting on an appeal, copy two will be retained by the unit where the punishment was imposed. It will be destroyed when the period of suspension expires unless forwarded according to paragraph 3–38 below. If the punishment includes only a reduction, copy three will be forwarded to the MPD/PSC maintaining the MPRJ. If the punishment includes a reduction and a forfeiture or only a forfeiture, copy three will be forwarded through the MPD/PSC maintaining the MPRJ to the Finance and Accounting Office maintaining the soldier's pay account for use as a substantia[redacted] document according to AR 37–104–3.

e. Copy four of DA Form 2627.

(1) *General.* Immediately after imposition of punishment, copy four will be annotated in the left–hand corner of the title block (fig 3–2), sequentially in the order the Article 15 was given during the calendar year; that is, 84–1, 84–2. If the unit maintains a Reconciliation Log (para 3–39), the appropriate information will be entered in it. Thereafter, copy four will be used according to (2) and (3) below.

(2) *Cases involving an appeal.*

(a) On the date punishment is imposed, if item 7 is not completed or blocks b and c are initialed, and item 7 is signed by the soldier and the punishment includes an unsuspended reduction or unsuspended forfeiture of pay, copy four of DA Form 2627 will be marked "APPEAL PENDING" in the right–hand margin.

(b) Copy four will be sent through the MPD/PSC maintaining the MPRJ to the Finance and Accounting Office maintaining the soldier's pay account. On receipt, the local MPD/PSC and the Finance and Accounting Office maintaining the soldier's pay account will check that proper action has been taken on unsuspended reductions and forfeitures of pay. If the punishment includes a reduction, the MPD/PSC will see that the left–hand margin is annotated with the words, "ENTRY POSTED," the date of posting, and the initials of the posting clerk. If the punishment includes a forfeiture, finance will see that the left–hand margin is annotated with the words, "ENTRY POSTED," the date of posting, and the initials of the posting clerk.

(c) On receipt of the copies of DA Form 2627 forwarded by the unit (para 3–37d), copy four will be returned directly to the imposing commander to verify that the entry has been posted by finance (para 3– 39). Copy four will be destroyed after all periods of suspe[redacted]sion of punishment affecting pay have expired.

(d) If punishments affecting pay are suspended, copy four wi[redacted] not be transmitted to the MPD/PSC and finance. It will be destroyed after all periods of suspended punishments affecting pay have expired.

(e) If there are no punishments affecting pay, copy four will not be transmitted to the MPD/PSC and finance and will be destroyed after the entry is made in the Reconciliation Log.

(3) *Cases not involving an appeal.*

(a) Where there is no appeal and the punishment imposed includes an unsuspended reduction or unsuspended forfeiture of pay, copy four will not be marked "APPEAL PENDING." If the punishment imposed includes only an unsuspended reduction, copy four will be forwarded with copies two and three to the MPD/PSC that will see that the left–hand margin is annotated with the words "ENTRY POSTED," the date of posting, and the initials of the posting clerk. If the punishment imposed includes an unsuspended reduction and unsuspended forfeiture or only an unsuspended forfeiture, copy four will be forwarded with copy three to the Finance and Accounting Office maintaining the soldier's pay account that will see that the left– hand margin is annotated with the words "ENTRY POSTED," the date of posting, and the initials of the posting clerk. Copy four will be returned directly to the imposing commander to verify the entry has been posted by the MPD/PSC and/or finance (para 3–39) and destroyed after all periods of suspension of punishment affecting pay have expired.

(b) If punishments affecting pay are suspended, copy four will not be transmitted to the MPD/PSC and/or finance and will be destroyed after all periods of suspended punishments affecting pay have expired.

(c) If there are no punishments affecting pay, copy four will n[redacted] be transmitted to the MPD/PSC and/or finance and will be d[redacted] stroyed after the entry is made in the Reconciliation Log.

f. Copy five of DA Form 2627. Give to soldier punished.

g. Allied documents. Allied documents will be transmitted for administrative convenience with the original DA Form 2627 for filing on the restricted fiche of the OMPF (para 3–44).

3–38. Supplementary action

a. Supplementary action. Any action taken by an appropriate authority to suspend, vacate, mitigate, remit, or set aside a punishment (except punishment imposed under summarized proceedings, para 3–16) after action has been taken on an appeal or DA Form 2627 has been distributed according to paragraph 3–37 above.

b. Recording. Supplementary action will be recorded on DA Form 2627–2.

c. Distribution and filing.

(1) *Original.* The original will be forwarded to the appropriate custodian of the OMPF (para 3–37b(2)). This copy will be filed in the same OMPF fiche location as the DA Form 2627 that initially imposed the punishment. The imposing commander's filing determination on the initial DA Form 2627 will be annotated on the DA Form 2627–2 (fig 3– 3).

(2) *Copy One.* Copy one will be forwarded to the MPD/PSC to be filed in the soldier's MPRJ when the imposing commander directs filing on the performance fiche of the OMPF. This copy will be destroyed along with copy one of the initial DA Form 2627 if the original DA Form is transferred from the performance to the restricted fiche. In cases of filing on the restricted fiche of the OMPF, copy one will be filed in the unit personnel files per paragraph 3–37c(2).

(3) *Copies two and three.* If the action affects a reduction, copy two (and copy two of the initial DA Form 2627, if maintained by the unit (para 3–37d)) will be forwarded to the MILPO MPD/PSC. If the action affects a forfeiture copy three will be forwarded to the finance and accounting office maintaining the soldier's pay account.

(4) *Copy four.* Copy four will be annotated with the same sequence number as the initial copy four (para 3–37e(2)). If the action affects a reduction, it will be forwarded to the MPD/PSC maintaining the MPRJ which will annotate it as indicated below. If the action affects a forfeiture, it will be forwarded to the finance and accounting office maintaining the soldier's pay account which will annotate as indicated below. Either the MPD/PSC, finance, or both will see that the following is annotated in the left-hand margin and returned to the unit to verify the entry of subsequent actions in the Reconciliation Log:

(a) The words "ENTRY POSTED".

(b) The date of posting.

(c) The initials of the posting clerk.

(5) *Copy five.* Give to soldier punished.

3–39. Reconciliation Log

Imposing commanders will ensure that punishments imposed under the provisions of Article 15 are executed. Punishments of reduction and forfeiture of pay may be monitored by the optional use of the Reconciliation Log, DA Form 5110–R (Article 15 Reconciliation Log), showing the punishment and date imposed. DA Form 5110-R will be locally reproduced on 8½- by 11-inch paper. A copy for reproduction is located at the back of this regulation. To properly use DA Form 5110–R, copy four of all DA Forms 2627 must be sequentially numbered and the required data entered in the DA Form 5110–R. These entries are to be compared with copy four of the DA Form 2627 that was returned to the unit by the MPD/PSC and/or Finance and Accounting Office maintaining the soldier's pay account. Sequential numbers on the DA Form 5110–R, will correspond to the number noted on copy four. After information is verified on the DA Form 5110–R from copy four, this copy will be retained until the expiration of any period of suspension of punishments affecting pay.

3–40. Time for distribution of initial DA Form 2627

Distribution will be made according to paragraph 3–37 after the recipient indicates in item 7 that the recipient does not appeal. If the recipient appeals, the DA Form 2627, minus copy four (if it has been forwarded as an "APPEAL PENDING" copy (para 3–37e(2)), will be forwarded to the superior authority and distributed after completion of item 10. Completion of this item shows that the recipient acknowledges notification of action on the recipient's appeal. If item 10 cannot be completed because the recipient is not reasonably available or due to military exigencies, a statement signed by the imposing commander stating that the recipient was informed in writing of the disposition of the appeal and why it was not possible to have item 10 completed will be placed in item 11 before distribution is made. When the recipient appeals the punishment, an "APPEAL PENDING" copy will be distributed according to paragraph 3–37e(2). If the recipient fails to complete or sign item 7, an explanation of the failure will be provided by the imposing commander in item 11 and distribution will be made according to 3–37 or this paragraph, whichever is applicable (a recipient's refusal to indicate whether or not the recipient desires to appeal may be presumed to indicate an intention not to appeal).

3–41. Filing of records of punishment imposed prior to 1 November 1982

a. OMPF. Records of nonjudicial punishment presently filed in either the performance or restricted fiche of the OMPF will remain so filed, subject to other applicable regulations. Records of nonjudicial punishment imposed prior to 1 November 1982 and forwarded on or after 20 May 1980 for inclusion in the OMPF will be filed on the performance fiche.

b. MPRJ.

(1) Records of nonjudicial punishment imposed prior to 1 November 1982 and filed under AR 640–10 in the MPRJ will remain so filed.

(2) Copies of records of nonjudicial punishment imposed prior to 1 November 1982 where the original was filed in the OMPF will remain filed in the MPRJ unless the original Article 15 is transferred to the restricted fiche. In this case, the copy will be withdrawn from the MPRJ and destroyed.

3–42. Transfer of Article 15s wholly set aside or in cases of change of status

a. Change in status on or after 1 September 1979. On approval of a change in status from enlisted to commissioned or warrant officer, on or after 1 September 1979, DA Forms 2627 (recording nonjudicial punishment received while in an enlisted status and filed in the OMPF) will be transferred to the restricted fiche of the OMPF. Copies of such records in the Career Management Individual File (CMIF) and the MPRJ will be destroyed.

b. Wholly set aside since 1 September 1979. All DA Forms 2627 of commissioned officers, warrant officers, and enlisted soldiers filed in the OMPF reflecting that punishments have been wholly set aside (para 3–28) since 1 September 1979, will routinely be transferred to the restricted fiche. The DA Form 2627 reflecting the original imposition of punishment, if filed in the MPRJ or CMIF, will be destroyed.

c. Change in status and wholly set asides prior to 1 September 1979.

(1) On request of the individual soldier, the following will be transferred to the restricted fiche of the soldier's OMPF:

(a) Records of nonjudicial punishment received while serving in a prior enlisted status.

(b) Records of nonjudicial punishment wholly set aside prior to 1 September 1979. Copies of such records filed in the CMIF and the MPRJ will be destroyed.

(2) Transfer from the performance to the restricted file will automatically cause copies of such records filed in the CMIF to be destroyed. Requests will be mailed directly to the custodian of the MPRJ (usually at the local MPD/PSC) and to the following custodian of the OMPF:

(a) For active Army commissioned and warrant officers, send requests to HQDA (TAPC–MSR–S), ALEX VA 22332–0444.

(b) For active Army enlisted personnel, send requests to U.S. Army Enlisted Records and Evaluation Center, ATTN: PCRE–FS, Fort Benjamin Harrison, IN 46249.

(3) These requests will not constitute a basis for review by a special selection board or its equivalent.

3–43. Transfer or removal of records of nonjudicial punishment

a. General. This paragraph covers policies and procedures for enlisted soldiers (SGT and above) and commissioned and warrant officers to petition the DA Suitability Evaluation Board (DASEB) for transfer of records of nonjudicial punishment from the performance to the restricted portion of the OMPF. (See table 3–2.)

b. Policies.

(1) Enlisted soldiers (SGT and above), commissioned and warrant officers may request the transfer of a record of nonjudicial punishment from the performance fiche of their OMPF to the restricted fiche under the provisions of this regulation. To support the request, the person must submit substantive evidence that the intended purpose of Article 15 has been served and that transfer of the record is in the best interest of the Army.

(2) Requests normally will not be considered until a minimum of 1 year has elapsed and at least one nonacademic evaluation report has been received since imposition of the punishment.

(3) The request must be in writing and should include the soldier's current unit mailing address and duty telephone number. Requests by enlisted soldiers (SGT and above) should also include a true copy of the DA Form 2 (Personnel Qualification Record—PartI, DA Form 2A (Personnel Qualification Record, Part I—Enlisted Peacetime), and DA Form 2–1 (Personnel Qualification Record—Part II), certified by the custodian of the MPRJ. No person is authorized to appear in person before the DASEB.

(4) The officer who directed the filing of the record in the OMPF (of enlisted soldiers (SGT and above) and commissioned and warrant officers) may provide a statement to the soldier in support of a request for transfer of the record from the performance to the restricted fiche. Other evidence submitted in support of a request should not include copies of documents already recorded in the soldier's OMPF.

(5) The DASEB will review and evaluate the evidence submitted and obtained and will take final action where this authority has not been specifically withheld to the Deputy Chief of Staff for Personnel (DCSPER) or the DCSPER's delegate. Requesters will be notified in writing of the determination. Letters of denial will be placed upon the performance fiche of the soldier concerned. Other related documentation and evidence will be placed upon the restricted fiche.

(6) The DASEB has access to unfavorable information that might be recorded on DoD investigative records. If such information is used, in part or in whole, as the basis for denying a request, the soldier will be notified of this by correspondence (which will not be filed in the OMPF) and given an opportunity to review and explain the unfavorable information in a subsequent petition.

(7) The determination of the DASEB to transfer such records will not alone be a basis for review by a special selection board or its equivalent. The DCSPER, or the DCSPER's delegate, has the final authority in cases where circumstances exist that warrant referral to one of the above boards.

(8) The DASEB will consider subsequent requests only upon presentation of substantive evidence not previously considered.

c. Processing Requests.

(1) *Active Army personnel.* Requests in military letter format should be prepared and sent directly to the President, DA Suitability Evaluation Board, HQDA (DAPE–MPC–E), WASH DC 20315–0300.

(2) *Reserve component personnel.*

(a) Requests submitted by USAR officer and enlisted soldiers not on active duty are normally processed through the Commander, U.S. Army Reserve Personnel Center (ARPERCEN), 9700 Page Boulevard, St. Louis, Missouri 63132–5200. For officers, requests should be sent ATTN: DARP–OPM–A; for enlisted soldiers, ATTN: DARP–EPO. Commander, ARPERCEN will refer the appeal through the Office of the Chief, Army Reserve (ATTN: DAAR–PE) to the DCSPER (ATTN: DAPE–MPC–E) with a recommendation. The DASEB will then take action on the request.

(b) Requests submitted by ARNG officers and enlisted soldiers not on active duty will be processed through the proper State Adjutant General and the Chief, National Guard Bureau to the DCSPER (ATTN: DAPE–MPC–E) for proper action.

d. Amendment rights. These procedures do not limit or restrict the right of soldiers to request amendments of their records under the Privacy Act and AR 340–21. Neither do they limit or restrict the authority of the DASEB to act as an Access and Amendment Refusal Authority under AR 340–21.

e. Correction of military records. AR 15–185 contains policy and procedures for applying to the Army Board for Correction of Military Records (ABCMR) and for the correction of military records by the Secretary of the Army. Requests should be sent to the ABCMR to correct an error or remove an injustice only after other available means of administrative appeal have been exhausted. This includes requests under this paragraph. Absent compelling evidence to the contrary, a properly completed, facially valid DA Form 2627 will not be removed from a soldier's record by the ABCMR.

3–44. Use of records

a. Records of proceedings and supplementary action under Article 15 recorded on DA Forms 2627 and 2627–2, previously or hereafter administered, may be used as directed by competent authority. Allied documentation transmitted with the original or copies of DA Forms 2627 and 2627–2, where filed with any of these forms, shall be considered to be maintained separately for the purpose of determining the admissibility of the original or copies of DA Forms 2627 or 2627–2 at courts-martial or administrative proceedings.

b. A record of nonjudicial punishment or a duplicate as defined in M.R.E. 1001(4), not otherwise inadmissible, may be admitted at courts-martial or administrative proceedings from any file in which it is properly maintained by regulation. A record of nonjudicial punishment, otherwise properly filed, will not be inadmissible merely because the wrong copy was maintained in a file.

CHAPTER 4

NONJUDICIAL PUNISHMENT

TEACHING OUTLINE

I. INTRODUCTION.

II. AUTHORITY TO IMPOSE ARTICLE 15s.

A. Who May Impose?

Commanders.

B. Can Article 15 Authority Be Delegated?

1. Article 15 authority may <u>not</u> be delegated.

2. Exception: General court-martial convening authorities and commanding generals can delegate Article 15 authority to a deputy or assistant commander or to chief of staff (if general officer). Delegation must be written.

C. Can Article 15 Authority Be Limited? <u>Yes</u>.

1. Permissible limitations.

a. Superior commander may <u>totally</u> withhold.

b. Superior commander may <u>partially</u> withhold (e.g., over categories of personnel, offenses, or individual cases).

c. No requirement that limitations be written but probably a good idea (e.g., publish in post regulation).

2. Impermissible limitations.

a. Superior commander cannot direct a subordinate commander to impose an Article 15.

b. Superior commander cannot issue regulations, orders, or guides that either directly or indirectly suggest to subordinate commanders that --

(1) Certain categories of offenders or offenses be disposed of under Article 15.

(2) Predetermined kinds or amounts of punishment be imposed for certain categories of offenders or offenses.

III. OFFENSE

A. When is an Article 15 Appropriate?

1. Minor offenses.

2. Correct, educate, reform offenders.

3. Preserve a soldier's record of service from unnecessary stigma.

4. Further military efficiency.

B. Double Jeopardy Issues.

1. Prior trial by civilians.

2. Subsequent court-martial.

IV. TYPES OF ARTICLE 15s.

A. Formal Article 15.

1. Appropriate if soldier is an officer

or

2. Punishment (for any soldier) might exceed 14 days extra duty, 14 days restriction, oral admonition or reprimand, or any combination thereof.

3. Recorded on DA Form 2627. See Appendix A, page 4-19.

B. Summarized Article 15.

1. Appropriate where soldier is enlisted and punishment should not exceed 14 days extra duty, 14 days restriction, oral admonition or reprimand, or any combination thereof.

2. Recorded on DA Form 2627-1. See Appendix B, page 4-21. Handwritten OK.

V. NOTICE REQUIREMENT. Soldier must be notified of the following:

A. Commander's Intention to Dispose of the Matter under Article 15.

B. Maximum Punishment Which the Commander Could Impose under Article 15.

C. Offense Believed to be Committed.

D. Notice includes Soldier's Rights Under Article 15. See Appendix A, DA Form 2627, item 2, page 4-19.

1. Formal.

(a) A copy of DA Form 2627 with items 1 and 2 completed so defense counsel may review and properly advise soldier.

(b) Remain silent.

(c) Consult with counsel (usually 48 hours).

(d) Demand trial by court-martial (unless attached to or embarked in a vessel).

(e) Request an open hearing.

(f) Request a spokesperson.

(g) Examine available evidence.

(h) Present evidence and call witnesses.

(i) Appeal.

2. Summarized.

(a) Reasonable decision period (normally 24 hours).

(b) Demand trial by court-martial.

(c) Remain silent.

(d) Hearing.

(e) Present matters in defense, extenuation, and mitigation.

(f) Confront witnesses.

(g) Appeal.

E. Delegating the Notice Responsibility.

1. Commander may delegate the notice responsibility to any subordinate who is a SFC or above (if senior to soldier being notified).

2. Good way to involve first sergeant or command sergeant major?

F. How to Give Notice. See Script, Appendix C, page 4-23, Appendix B, AR 27-10.

VI. HEARING.

A. In the Commander's Presence.

B. "Open" v. "Closed" Hearing.

C. Witnesses.

D. Spokesperson.

E. Defense counsel's role.

F. Rules of Evidence.

1. Commander is not bound by the formal rules of evidence.

2. May consider any matter the commander believes relevant (including, e.g. unsworn statements and hearsay).

G. Decision on Guilt or Innocence.

Proof beyond a reasonable doubt required.

VII. PUNISHMENTS.

A. Maximum Punishment. See Appendix D, page 4-25; Table 3-1, AR 27-10.

B. Four Types of Punishment.

1. Reduction in grade.

2. Loss of liberty punishments.

a. Correctional custody.

b. Extra duty.

c. Restriction.

3. Forfeiture of pay.

a. Forfeitures are based on grade to which reduced, whether or not reduction is suspended.

b. Reconciliation log, DA Form 5110-R, may be used to monitor pay forfeitures.

c. Forfeitures can be applied against retirement pay.

4. Admonition and reprimand.

C. Combination of Punishments.

VIII. FILING OF ARTICLE 15s.

A. Formal Article 15s.

1. E-4 and below.

a. Original DA Form 2627 filed locally in unit nonjudicial punishment files. Copies two and three to the MILPO that services the MPRJ if the punishment includes an unsuspended reduction and/or forfeiture of pay.

b. Destroyed two years after imposition or upon transfer to another general court-martial convening authority.

2. All other soldiers.

a. Performance fiche or restricted fiche of OMPF.

b. Imposing commander's determination is final unless soldier has an Article 15, received while he was a sergeant (E-5) or above, filed in his restricted fiche - bumps all subsequent 15s to performance fiche.

c. Superior commander cannot withhold subordinate commander's filing determination or change filing decision on appeal.

B. Summarized Article 15s.

1. DA Form 2627-1 filed locally.

2. Destroyed two years after imposition or upon transfer from the unit.

IX. APPEALS.

A. Soldier only has one right to appeal under Article 15.

B. Time Limits to appeal.

1. Reasonable time.

2. After 5 days, appeal presumed untimely and may be rejected.

C. Who Acts on an Appeal?

1. Next superior commander.

2. Any superior commander, senior to the appellate authority, may act on an appeal.

3. Successor in command or imposing commander can take action on appeal.

4. Appellate authority has 5 calendar days to act on formal article 15 appeal; 3 days to act on summarized article 15 appeal.

D. Procedure for Submitting Appeal.

1. Indicate on DA Form 2627, item 7 or DA Form 2627-1, item 4. <u>See</u> Appendices A and B, pages 4-19 and 4-21, respectively.

2. Submitted through imposing commander.

E. Action by Appellate Authority.

1. May conduct independent inquiry.

2. Must refer certain appeals to the SJA office for a legal review <u>before</u> taking appellate action. See note 9, back of DA Form 2627, page 4-20.

3. May refer an Article 15 for legal review in any case, regardless of punishment imposed.

4. May take appellate action even if soldier does not appeal.

5. See Appendix E, page 4-26, for commander's options on appeal.

   a. Approve punishment.

   b. Suspend (consider vacation if subsequent misconduct or violation of a condition imposed by the commander).

   c. Mitigate.

   d. Remit.

   e. Set Aside.

6. Use DA Form 2627-2, Appendix F, page 4-27 if relief granted on appeal after distribution of DA Form 2627 (including copies).

F. Petition to the Department of the Army Suitability Evaluation Board (DASEB).

1. Sergeants and above may petition to have DA Form 2627 transferred from the performance to the restricted fiche.

2. Soldier must present evidence that the Article 15 has served its purpose and transfer would be in the best interest of the Army.

3. Petition normally not considered until at least one year after imposition of punishment.

X. PUBLICIZING ARTICLE 15s.

XI. ADMINISTRATIVE CONSEQUENCES OF AN ARTICLE 15.

A. Formal Article 15 - DA Form 2627.

1. Admissible at trial by court-martial.

2. May be reported to National Criminal Information Center (NCIC). See Appendix G, page 4-28.

3. May be considered in administrative proceedings.

4. Not an automatic bar to reenlistment.

B. Summarized Article 15 - DA Form 2627-1.

1. Not admissible at trial by court-martial.

2. May be considered in administrative proceedings.

3. Not an automatic bar to reenlistment.

XII. CONCLUSION.

CHAPTER 5

SEARCH AND SEIZURE

Introduction

The fourth amendment protects individuals from "unreasonable" searches and seizures, and requires that searches and seizures be based upon probable cause and a warrant.

The fourth amendment applies to soldiers. Soldiers do not waive their fourth amendment rights when they join the Army. However, the fourth amendment applies to soldiers differently than it does to civilians. This is because a soldier's privacy rights are balanced against not only law enforcement needs but also against military necessity and national security.

An example of how the fourth amendment applies to soldiers differently than it does to civilians is search authorizations. A civilian search "warrant" must be in writing, under oath, and issued by a civilian magistrate. A military search "authorization," on the other hand, need not be in writing, need not be under oath, and may be issued by a commander. Despite these technical distinctions, the terms "search warrant" and "search authorization" basically mean the same thing and are often used interchangeably.

Another example of how the fourth amendment applies to soldiers differently than to civilians is urinalysis testing. Most civilians presently are not subject to random urinalysis testing for illegal drug use. Soldiers, however, must give urine samples during routine health and welfare inspections. This greater intrusion into a soldier's privacy is justified because of the detrimental impact that illegal drug use has on military operations and national security.

Searches and seizures need not always be based on probable cause and a search warrant or authorization. There are several situations where the fourth amendment does not apply, such as searches of government property or seizures of items in plain view. There are also situations where the fourth amendment applies but no probable cause or warrant are required. For example administrative inspections, such as health and welfare inspections, urinalysis inspections, gate inspections, and inventories, need not be based on probable cause or a warrant.

The search and seizure rules are complex and constantly changing because of court interpretations. Therefore, the best advice is to contact your legal adviser whenever a fourth amendment issue comes up. Your legal adviser can advise you on the legality of proposed actions, and recommend alternatives which will lessen the likelihood that evidence may be found inadmissible at a court-martial.

A. Warrants and Probable Cause.

1. Probable Cause.

a. Probable Cause Defined. There is probable cause to search when there are reasonable grounds to believe that items connected with criminal activity are located in the place or on the person to be searched.

b. Evaluating Probable Cause. A commander may determine that probable cause exists based on his or her personal observations, or information from others (hearsay). The commander's task is to determine from the totality of the circumstances whether it is reasonable to conclude that evidence of a crime is in the place to be searched. In determining whether probable cause exists, the following method for evaluating the information should be used.

(1) Factual Basis. The commander should be satisfied that the information was obtained in a reliable manner. The informant should have actually seen, or heard the information being reported. This may be satisfied in any of the following ways:

(a) Personal observation. The trustworthiness of information can be established if the informant personally observed the criminal activities. In drug cases, you should also inquire why the informant believes that what he or she saw was drugs. You should determine whether the informant had a class on drug identification, furnished reliable information in the past, or had substantial experience with drugs.

(b) Admission of the suspect. An informant's information is considered reliable if based on statements he or she heard the suspect or an accomplice make.

(c) Self-verifying detail. The factual basis of an anonymous tip may be established if the tip is so detailed that the information must have been obtained as a result of a personal observation.

(2) Believability. The commander should also be satisfied as to the credibility of the person furnishing the information. This may be established by one or more of the following:

(a) Demeanor. When the information is personally given to the commander, the commander can judge the informant's believability at that time. In many cases the individual may be a member of the commander's unit and the commander is in the best position to judge the credibility of the person. Even when the person is not a member of the commander's unit, the commander can personally question the individual and determine the consistency of statements made by the individual.

(b) Past reliability. This is one of the easiest methods for establishing believability: knowledge that the informant has proven reliable in the past. A commander should examine the underlying circumstances of past reliability, such as a record that the informant has furnished correct information in the past.

(c) Corroboration. Corroboration means that other facts back up the information provided. Corroboration and the demeanor of the person are particularly important when questioning first-time informants with no established record of past reliability.

(d) Declaration against interest. The person furnishing the information may provide information that is against that person's penal interest. For example, when a person knowingly admits to an offense and has not been promised any benefit, he or she may be prosecuted for that offense. This lends a great degree of reliability to the information furnished.

(e) Good citizen informants. Often, the informant's background renders him or her credible. For instance, a victim or a bystander with no reason to lie may be considered reliable. In addition, law enforcement officers and good soldiers are generally considered reliable sources of information.

2. Search Warrants and Authorizations.

a. Commander's Authorization. A commander may authorize searches of his or her soldiers and equipment, or areas he or she controls, when there is probable cause to believe that items connected with criminal activity are located in the place or on the person to be searched. When time permits, the commander should consult a legal adviser first. A commander may not delegate the authority to authorize searches to others in the unit. The power to authorize a search, however, may devolve to an acting commander if the commander is absent.

b. Magistrate's and Judge's Authorization. Ordinarily, when there is a magistrate (designated JAG officer) or a judge on the installation, law enforcement or unit personnel should get the magistrate's or judge's authorization to search. Using a magistrate to authorize a search may be preferable to requesting authorization from a commander for several reasons. First, commanders may be involved in an investigation related to a search and their neutrality could become an issue. Second, the magistrate may authorize searches anywhere on an installation; therefore, issues of scope of authority are avoided. Third, if a search authorization is contested at trial, the commander need not appear to testify.

c. Procedures for Obtaining an Authorization to Search. AR 27-10, Military Justice (22 December 1989), sets out the procedures for obtaining an authorization to search. Written or oral statements (including those obtained by telephone or radio), sworn or unsworn, should be presented to the commander, magistrate, or military judge. The authorizing official will then decide whether probable cause to search exists, based upon the statements and will issue either a written or an oral authorization to search. Written statements and authorizations are preferred to avoid problems later if the search is challenged at trial. When granting authority to search, the authorizing official must specify the place to be searched and the things to be seized. Sample forms for obtaining an authorization to search are in the back of AR 27-10.

d. Scope of an Authorized Search. Once authorization to search has been obtained, the person conducting the search must carefully comply with the limitations imposed by the authorization. Only those locations which are described in the authorization may be searched and the search may be conducted only in areas where it is likely that the object of the search will be found. For example, if an investigator has authority to search the quarters of a suspect, the investigator may not search a car parked on the road outside. Likewise, if an authorization states that an investigator is looking for a 25-inch television, the investigator may not look into areas unlikely to contain a TV, such as a medicine cabinet or file cabinet.

e. Detention Pending Execution of Search Authorizations. An authorization to search for contraband implicitly carries the limited authority to detain occupants of a home, apartment, or barracks room while the search is conducted. Police may also detain occupants leaving the premises at the time police arrive to execute the search authorization.

3. Commander Must Be Neutral and Detached.

a. A commander, much like a judge, must remain objective when deciding whether there is sufficient information to justify a search authorization. When a commander is actively involved in a criminal investigation, he or she is disqualified from acting as the authorizing official.

b. A commander is not neutral and detached if he or she initiated or orchestrated the investigation or conducted the search personally. On the other hand, knowledge of an on-going investigation within the unit, disdain for certain kinds of crime, and personal information or knowledge about a suspect's character do not disqualify a commander from granting a search authorization.

c. If a commander is unsure whether a court will view his or her involvement in a particular case as disqualifying, the commander should play it safe by sending the person seeking the authorization to the military magistrate or to the next higher commander who has no involvement with the case.

B. Exceptions to the Fourth Amendment.

1. Nongovernmental Searches. The fourth amendment only protects soldiers against searches by U.S. government officials. It does not cover searches by private persons or foreign officials.

a. Private Searches. The fourth amendment does not prohibit searches by private persons (roommates or family members), unless the private search was directed by a commander or police investigator. Be careful when working with unit informants. Telling them to "keep your eyes open" is permissible; telling them to bring you evidence may violate the fourth amendment and render the evidence inadmissible.

b. Foreign Searches. The fourth amendment applies only to the U.S. Government. Searches by German or Korean police need not comply with the fourth amendment unless the foreign search is directed, conducted, or participated in by U.S. agents. Foreign police may freely exchange criminal information with the military police.

2. No Reasonable Expectation of Privacy. The fourth amendment does not apply unless the suspect has a reasonable expectation of privacy in the area searched.

a. Government Property. A soldier has no reasonable expectation of privacy in most government property, including military vehicles, tents, common tool kits, and office desks. No authorization is required to search these places. But the fourth amendment does cover items issued for personal use, such as wall lockers, foot lockers, and field gear. These items may be examined only during inspections and authorized searches.

b. Abandoned Property. There is generally no expectation of privacy in abandoned property, such as a car abandoned on a public road, on-post quarters after a person has checked out, items thrown from a window or to the ground, garbage containers placed on a street curb, or a building destroyed by fire. Therefore, no authorization or probable cause is required to search or seize these items.

c. Open View. What a person knowingly exposes to the public is not subject to fourth amendment protection. For example, a tattoo, a gold tooth, or the exterior of a car parked on a public street are not protected by the fourth amendment.

d. Sensory Aids. So long as a person is lawfully present in an area, he or she may properly use devices which enhance the senses. For example, flashlights may be used to look inside cars and dogs may sniff autos, luggage, or field gear. Special rules exist for the use of wiretaps and electronic "bugs." See your trial counsel if you feel electronic surveillance is necessary.

3. Exigent Circumstances. In emergencies, where the delay necessary to get a warrant would result in the removal, destruction, or concealment of evidence, a warrant is not required. However, probable cause is still required in these situations. For example, a staff duty officer walking through a barracks who smells marijuana coming from a soldier's room may enter the room and "freeze" the situation. If he apprehends the soldier for using marijuana, he may conduct a search of the soldier incident to apprehension and may also seize any items in plain view. He should then seek authorization before he searches the rest of the room.

4. Automobile Exception. If there is probable cause to search an automobile, a warrant or authorization is generally not required. For example, if a staff duty officer has probable cause to believe that drugs are located in a soldier's car, he may search the car without obtaining a warrant or search authorization. This exception exists because such evidence may be easily lost if the automobile is driven away before a warrant or authorization is obtained. The entire automobile may be searched, to include the trunk.

5. Consent Searches. A soldier may consent to a search. However, the consent must be voluntary and not coerced by the influence of rank or position. When requesting consent you should advise the soldier that he or she has the right not to consent. If the soldier does consent, he or she can withdraw the consent at any time. In this case, the search must stop immediately. A soldier may consent to a partial search (for example, everything but the wall locker). Article 31 rights and written consent are recommended but not required. Do not "threaten" a soldier that the search will be conducted even if he or she refuses to give consent.

6. Search Incident to Apprehension. Any person who has been properly apprehended may be searched in order to ensure the safety of the apprehending person and others, and to prevent destruction of evidence. Only the person's clothing and body and any areas within the person's reach may be searched. When a person is apprehended in an automobile, the entire passenger compartment may be searched. This includes the glove box, console, back seat and under the seats, but does not include the trunk.

7. Inspections.

a. General. Inspections are a function of command. The commander has the inherent right to inspect the barracks to ensure the command is properly equipped, maintained, and ready, and that personnel are present and fit for duty. A commander conducting an inspection may find items that could aid in a criminal prosecution. These items may be seized and used as evidence for an Article 15 or court-martial.

(1) Primary purpose test. An inspection must have a primary administrative purpose. For example, inspections to ensure security, readiness, cleanliness, order, and discipline are permissible. Inspections may include an examination to locate and confiscate unlawful weapons and other contraband, since confiscation of contraband is a means of ensuring security, readiness, and order. An inspection whose primary purpose is to obtain evidence for an Article 15 or court-martial is not permissible, and any evidence discovered will be inadmissible. An inspection may have a dual purpose (both administrative and criminal) so long as the primary purpose is administrative.

(2) Scope. The scope of an inspection must reflect its purpose. If the purpose is broad (general security, readiness, fitness for duty) then the intrusion may be broad (unroll sleeping bags, check inside pockets, unlock containers). If the purpose of the inspection is narrow (for example, only to check helmet accountability), then one cannot inspect beyond that purpose.

(3) Subterfuge rule. An inspection may not be used as a subterfuge for a search. This normally takes place when a commander "feels" an individual has contraband in his possession or living area but lacks sufficient information to amount to probable cause, and uses an "inspection" to search that person for the contraband. Evidence discovered during an improper inspection usually is not admissible for court-martial or Article 15 purposes. If (1) an inspection immediately follows a report of a specific offense and was not previously scheduled, or (2) specific persons are targeted, or (3) persons are subjected to substantially different intrusions, then the government must show by clear and convincing evidence that the primary purpose of the examination was administrative, and that the inspection was not a ruse for an illegal criminal search. The commander's testimony is crucial to this issue.

b. Health and Welfare Inspections. The most common type of inspection is an commander's inspection of the unit to protect the health and welfare of the unit's soldiers.

(1) The primary purpose of such an inspection must be administrative. Commanders should ensure that the scope of the inspection is consistent with the purpose and that everyone is treated alike. For example, if one soldier's wall locker is inspected with "extra care" during a health and welfare inspection, the inspection will likely be found to be an unlawful subterfuge for a criminal search.

(2) Drug Dogs. A commander conducting a health and welfare inspection may use a drug detector dog to enhance the senses of individuals conducting the inspection. Drug detector dogs may be used to inspect barracks, automobiles, and other areas, but as a matter of DA policy, will not be used to inspect persons. Drug dogs may not sniff individual soldiers or formations. When a request is made for a handler and dog to go to a particular unit, the commander requesting the team should ask the provost marshal about the reliability of the dog and handler. Before the dog is used, the handler should demonstrate the reliability of the dog. The test for reliability consists of certification from an approved training course, the training and utilization alert record, and performance demonstrated to the commander.

c. Lost Weapons Lock-downs. The commander has the right to conduct an inspection for weapons or ammunition after a unit has been firing or has found a weapon missing. The commander or designated representatives may inspect all persons who were on the range and others who were in a position to steal the weapon, and their barracks and private automobiles.

d. Gate Inspections. A gate inspection is another form of an administrative inspection. An installation commander may authorize gate inspections to check drivers' licenses and vehicle registrations, deter drug traffic, reduce DWI incidents, prevent terrorist attacks, deter larcenies, or any other legitimate administrative purposes. Inspections may include all vehicles, or only those designated by the commander, such as every tenth vehicle.

(1) Written guidance. Gate inspections are governed by AR 210-10, Installations, Administration (12 September 1977). The installation commander must issue written instructions defining the purpose (e.g. security, drugs, or and DWIs), times, locations, and methods for gate inspections. It is important to limit the discretion of the gate guards conducting the inspection. Some discretion to consider traffic patterns is permissible so long as it is provided by the written guidance.

(2) Notice. All persons must receive notice in advance that they are subject to inspection upon entry, while within the confines, and upon departure from the installation. A warning sign or visitor's pass are common ways to give notice.

(3) Drug dogs. Metal detectors, drug dogs, and other technological aids may be used during gate inspections.

(4) Civilian employees. Civilian employees may be entitled to overtime pay when their working conditions are affected by gate inspection delays. Check the local collective bargaining agreement to gauge this impact.

(5) Entry inspections. Civilians entering the installation may only be inspected with their consent. If they refuse to consent, they should be denied access to the installation. Soldiers may be ordered to comply with an inspection, and may be inspected over their objection, using reasonable force, if necessary.

(6) Exit inspections. Civilians exiting the installation may be inspected over their objection, using reasonable force if necessary. Civilians who refuse to comply with an exit inspection should be informed of possible administrative sanctions (loss of post driving privileges, bar letter). Immediately notify the installation commander if this happens. If contraband is found, detain the civilians and notify the local civilian police. The standard for exit inspections for soldiers is the same as for entry inspections; they may be ordered to submit to an inspection and reasonable force may be used if necessary.

e. Inventories.

(1) General. A commander is required to conduct an inventory of a soldier's property when the soldier is AWOL, admitted to the hospital, or on emergency leave. See AR 700-84, Issue and Sale of Personal Clothing (15 May 1983). The commander or a designated representative should also inventory the property of an individual who has been placed in military or civilian confinement. See AR 190-47, The U.S. Army Correctional System (1 October 1978). If the person conducting the inventory discovers items that would aid in a criminal prosecution, those items may be seized and used as evidence.

(2) Automobiles. Under some circumstances, automobiles may also be inventoried. When a person is arrested for DWI or for some other offense which requires transportation to the MP station, the person's vehicle may be secured. If the vehicle is impounded, it may be inventoried. If a person is arrested for DWI just as he pulls into his quarters' parking lot, there is no reason to impound the vehicle. But if the person is arrested on an outer road of the post where there is a possibility of vandalism, the vehicle may be impounded and inventoried.

C. Apprehensions

1. Contacts and Stops and Apprehensions.

a. Contacts. Officers, NCOs, and MPs may initiate "contact" with persons in any place they are lawfully situated. Generally, such contacts are not "apprehensions" subject to the fourth amendment. Most contacts do not result from suspicion of criminal activity. Examples of lawful contacts include questioning witnesses to crimes and warning pedestrians that they are entering a dangerous neighborhood. These types of contacts are entirely reasonable, permissible, and within the normal activities of law enforcement personnel and commanders. They are not detentions in any sense.

b. Stops. An officer, NCO, or MP who reasonably suspects that a person has committed, is committing, or is about to commit a crime has the obligation to stop that person. Both pedestrians and occupants of vehicles may be stopped. If the person is a suspect and is to be questioned, Article 31 warnings should be read. The stop must be based on more than a hunch. The official making the stop should be able to state specific facts to support the decision to stop an individual.

c. Apprehensions. Arrests in the military are called apprehensions. Any officer, noncommissioned officer, or military policeman may apprehend individuals when there is probable cause to apprehend. Generally, a person is apprehended when he or she is not free to leave. The person making the apprehension should identify himself or herself and tell the suspect he or she is under apprehension. The suspect should also be told the reason for the apprehension and read his or her Article 31 rights, preferably from a rights warning card, as soon as practicable. If the suspect resists apprehension he or she may be prosecuted for resisting apprehension or disobeying an order. Civilians may be detained until military or civilian police arrive.

2. Probable Cause to Apprehend. A person may be apprehended only if there is probable cause that the person has committed a crime. Probable cause to apprehend is a common sense appraisal based on all of the facts and circumstances present. An example of probable cause to apprehend is when you or some other reliable person has seen an individual commit a violation of the UCMJ, such as using marijuana, assaulting someone, breaking another's property, or being drunk and disorderly.

3. Arrest Warrants. Generally, if there is probable cause, no authorization to apprehend (arrest warrant) is required in the military. There is one important exception, however; that is when you apprehend someone in a "private dwelling," such as on-post family quarters, the BOQ or BEQ, or any off-post quarters. If the person to be apprehended is in a "private dwelling," the apprehending officer must obtain authorization to make the apprehension from a military magistrate or the commander with authority over the private dwelling (usually the installation commander). Barracks and field encampments are not considered private dwellings; therefore, no special authorization is needed to apprehend someone there. Also, to apprehend a person at off-post quarters requires coordination with civilian authorities and may require a search warrant from a civilian judge.

E. Urine Tests

1. Use of Test Results.

a. There are four kinds of urine tests: inspections, probable cause tests, consent tests, and fitness-for-duty tests. Results from inspection, probable cause, and consent urine tests may be used for Article 15, court-martial and administrative separation purposes. The results of a fitness-for-duty test may not be used as a basis for an Article 15 or court-martial. In addition, a positive fitness-for-duty test result may not be used in an administrative separation action unless the soldier receives an honorable discharge. See AR 635-200, Personnel Separations, Enlisted Personnel (5 July 1984).

b. Command-direct. Be wary of the term command-directed" urinalysis. Any urine test ordered by the commander (inspection, probable cause, fitness-for-duty) is "command-directed." The ability to use the test results for UCMJ or separation purposes depends on the type of test (inspection, probable cause, consent), not on whether or not it is labeled "command-directed." A fitness-for duty test is normally "command-directed," but a positive result may not be used for UCMJ purposes.

2. Urinalysis inspections.

a. Unit integrity. A unit urinalysis test is merely another form of inspection. All of the soldiers in a unit may be tested or soldiers may be "randomly" selected, usually based on the final digit of their social security number, for testing. Alternatively, a portion of the unit (platoon, section, squad) may be tested.

b. Unit Alcohol and Drug NCO. When the government loses a urinalysis case it is rarely due to laboratory errors. Army urine testing laboratories are now widely regarded as the models for comparison and employ the most stringent scientific testing equipment and techniques. When the government loses a urine case or decides not to prosecute one, it is primarily due to problems at the unit level, usually with the chain of custody. Many of these problems stem from the Unit Alcohol and Drug NCO. If a commander takes a soldier who cannot perform adequately as a squad leader and makes that soldier the Unit Alcohol and Drug NCO, it is likely that there will be problems.

3. Probable cause urine tests. Probable cause urine tests follow the same rules as other probable cause searches. If, under the totality of the facts and circumstances, a commander has a reasonable belief that a soldier has used drugs, then he may order the soldier to provide a urine sample. The results of that test are admissible. Common examples of probable cause urine tests are (1) when drugs are discovered on a soldier's person, car, wall locker or field gear; and (2) when a soldier has been observed using drugs.

4. Consent urine tests.

a. Consent must be voluntary. A consent urine test is a form of consent search. No probable cause or authorization is required, but the commander must be able to show that the soldier voluntarily consented to provide a urine sample and was not coerced by the rank or position of the person requesting the sample. When a commander asks a soldier to provide a urine sample, he may advise the soldier of his Article 31 rights and ask the soldier to sign a consent form. If the soldier has no questions, then the consent will normally be viewed as voluntary.

b. What to do if the soldier asks questions. If a soldier asks the commander, "What are my options?", a new problem arises. In response to the "what are my options" question, the commander should explain the differences between a consent urine test and one ordered by the commander. The results of a consent urine test may be the basis for an Article 15, court-martial or administrative elimination. The results of a fitness-for-duty urine test may not. If the soldier understands these differences and nevertheless consents, the consent will probably be viewed as voluntary.

c. Consent as a back-up. If a commander has probable cause to order a urine test, he may still request a consent sample as a precautionary alternative. If the soldier asks "what are my options" the commander should explain that the results of a consent urine test are admissible and, if the soldier refuses to consent, the commander may order a urine test. However, the commander should also tell the soldier that if the commander orders the test, the results may not be admissible if it is later determined that the commander did not have probable cause. In this case, the test results may not be used for Article 15 or court-martial purposes and may only be used in an administrative separation if the soldier receives an honorable discharge.

5. Fitness-for-duty urine tests.

a. Results inadmissible. AR 600-85, Alcohol and Drug Abuse Prevention and Control Program (21 October 1988) provides that a commander may order a urine test to determine the "fitness-for-duty" of any soldier when the commander observes, suspects, or otherwise becomes aware that the soldier may be affected by illegal drug use. The results of such a fitness-for-duty test are inadmissible for Article 15 or court-martial purposes. They are inadmissible because AR 600-85 balances the needs of the military with the individual privacy rights of the soldier and will not allow test results based on mere suspicion to be used for punishment. A commander can order a soldier to provide a urine sample based solely on mere suspicion; but because this is not based upon probable cause, an inspection, or consent, the results may only be used to refer the soldier for rehabilitative treatment or separate him from the service with an honorable discharge. When a commander orders a soldier to provide a urine sample, the commander should understand the admissibility of the urine test so there is no confusion when the test result returns.

b. Suspicion is less than probable cause. Reasonable suspicion sufficient to order a fitness for duty test must be based upon facts which a commander can articulate. However, it must not amount to probable cause (reasonable belief to believe that a soldier has used drugs). For example, if a soldier reports that he heard a rumor that another soldier used cocaine, but had no personal knowledge of the use, there are insufficient facts to authorize a probable cause urine test. The commander may call the suspect to his office and confront him with the allegation. But unless the suspect consents to provide a sample, the results of a urine test ordered by the commander are inadmissible because this would be a fitness-for-duty test. A commander would have probable cause if a reliable soldier had seen the soldier use drugs and reported this to the commander. Then the test result would be admissible for Article 15 or court-martial purposes.

6. Confirmatory testing. One of the most difficult cases that a commander must handle is when a senior NCO, particularly one who is a "good soldier," tests positive for drug use. The soldier may deny drug use and challenge the validity of the testing procedures at the unit and the lab, often focusing on minor irregularities that do not invalidate the results. A commander has a few options to resolve these dilemmas.

(1) Polygraphs. Offer the soldier the opportunity to take a polygraph. A soldier may not be required to take a polygraph, but if he consents to take one, the local CID polygrapher can be invaluable in distinguishing those who did not use drugs from those who only swear that the urine test was wrong. Few of these "wronged" soldiers will be willing to take a polygraph, and many of those who do will admit to the drug use after failing the polygraph test.

(2) Blood and DNA testing. When a soldier alleges that his or her urine sample was switched with someone else's, the sample can be tested to ensure that the blood type of the positive sample is the same as the soldier's blood type. This method does not eliminate any possibility of error, but it may help determine whether the positive urine sample was, in fact, the soldier's sample. DNA found in the urine can also be compared with the soldier's DNA to confirm that the positive sample was submitted by the soldier. Unless there is evidence that the soldier's urine sample was switched, the government is not required to perform blood or DNA testing.

(3) Hair testing. If a soldier denies ever using drugs, his or her hair may be tested to confirm this allegation. Since traces of drugs are deposited in a drug user's hair as the hair grows, a hair sample will provide a history of an individual's drug use. Although hair analysis may be unable to detect a single use of drugs, it will be able to detect chronic use. The government is generally not required to pay for hair testing.

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APPENDIX A

COMMANDER'S GUIDE

TO ARTICULATE PROBABLE CAUSE TO SEARCH

1. Probable cause to authorize a search exists if there is a reasonable belief, based on facts, that the person or evidence sought is at the place to be searched. Reasonable belief is more than mere suspicion and is best described as "more likely than not". Witness or source should be asked three questions:

a. What is where and when? Get the facts!

(1) Be specific: how much, size, color, etc.

(2) Is it still there (or is information stale)?

(a) If the witness saw a joint in barracks room two weeks ago, it is probably gone; the information is stale.

(b) If the witness saw large quantity of marijuana in barracks room one day ago, probably some is still there; the information is not stale.

b. How do you know? Which of these apply:

(1) "I saw it there." Such personal observation is extremely reliable.

(2) "He [the suspect] told me." Such an admission is reliable.

(3) "His [the suspect's] roommate/wife/ friend told me." This is hearsay. Get details and call in source if possible.

(4) "I heard it in the barracks." Such rumor is unreliable unless there are specific corroborating and verifying details.

c. Why should I believe you? Which of these apply:

(1) Witness is a good, honest soldier; you know him from personal knowledge or by reputation or opinion of chain of command.

(2) Witness has given reliable information before; he has a good track record (CID may have records).

(3) Witness has no reason to lie.

(4) Witness has truthful demeanor.

(5) Witness made statement under oath. ("Do you swear or affirm that any information you give is true to the best of your knowledge, so help you God?")

(6) Other information corroborates or verifies details.

(7) Witness made admission against own interests.

2. The determination that probable cause exists must be based on facts, not only on the conclusion of others.

3. The determination should be a common sense appraisal of the totality of all the facts and circumstances presented.

4. Make a written note of the reasons why you authorized the search in case authorization becomes an issue later.

5. Talk to your legal advisor!

APPENDIX B

SEARCH AND SEIZURE

PRACTICE PROBLEMS AND SOLUTIONS

Incident #1. You are the battalion commander and your unit has just returned from a field training exercise that included several live fire exercises and the use of pyrotechnics. You wish to conduct a thorough inspection of your unit to ensure that none of your soldiers has any ammunition or pyrotechnics, and to ensure that their field gear is complete, clean, and serviceable.

1. Can you conduct an inspection? If you wish to use any discovered contraband as evidence, what should you do?

2. How should each room or area be inspected? Who should inspect? Where can they look? Wall lockers? Locked containers? How long in each area?

3. You have heard rumors that PFC High is a drug user and may be a seller. Can you use this inspection as an opportunity to give PFC High's room "an extra special going over?" Why or why not?

4. If you find drugs or stolen property in a soldier's wall locker during the inspection, can you use it as evidence?

Answers to Incident #1

Health and Welfare Inspection

1. Yes, as commander you may inspect the persons and property under your command. Ensure that any evidence discovered is accurately identified and promptly turned over to the MPs (chain of custody).

2. The commander determines the purpose and scope of the inspection before it begins - it may be as broad or as narrow as he feels is necessary. Usually NCOs inspect, but officers and drug dogs may participate. They may look anywhere within the scope of the inspection (where ammo or pyrotechnics may be found, or to check field gear). Soldiers may be ordered to unlock wall lockers and locked containers so that they may be inspected. The length of time inspecting each person or unit should be about the same, but may certainly be increased if unpreparedness is shown or contraband is discovered.

3. An inspection cannot be used as a subterfuge for an illegal search. If you give PFC High's room "an extra special going over," that would violate the subterfuge rule and be an illegal search, and any discovered contraband would probably be inadmissible. High's room should be treated the same as the others.

4. Yes, any evidence within the scope of a lawful inspection can be used against the soldier for Article 15, court-martial, or administrative elimination purposes.

Incident #2. You are the battalion commander. It is the end of the duty day and your command sergeant major has just read an Article 15 to PFC Mason, whose recent urine sample tested positive for marijuana. PFC Mason asks to talk to you. He tells you that he is tired of getting in trouble because of all the marijuana in the unit. Last night SPC Dealer showed Mason a small plastic bag of greenish vegetable matter that Dealer said was "good pot." Dealer removed the bag from the wall locker in his room, room 203, and Mason saw fifteen or twenty other plastic bags filled with the same material. Dealer said the bags were "going for $50 a lid" and if Mason were interested he could contact him anytime during the week. Dealer said to hurry though, because it was payday and the stuff would go fast.

1. Who can authorize a search of Dealer's locker?

2. What facts support a search? Why? Is there probable cause?

3. What is the scope of the search? What are you looking for? What if some ammunition is discovered, or a switchblade, or stolen property?

4. Where can you search? Only the wall locker? The entire room? Dealer's car, parked in the unit parking lot? What if it is parked at the post exchange?

5. How do you authorize the search? Oral or written? Who should conduct the search? What do you do with any evidence you find?

6. Dealer's wall locker is locked. Should you ask him for consent to search his room and belongings? Should you tell him that you have authority to search (a search warrant) if he refuses? If he refuses consent, can you cut his lock off?

Answers to Incident #2

Probable Cause Search

1. Any commander (CO, BN, BDE, DIV) in Dealer's chain of command, or the military magistrate or military judge (JAGs) may authorize this search.

2. Use the probable cause appendix. Mason's statement is one of the strongest forms of probable cause. The details about the location, amount, and description of the marijuana are based on personal observation. The report is fresh so it is likely the marijuana is still there. Mason realizes the consequences of lying to his battalion commander (although mere lying to a commander, unless an official statement, is not an offense). Mason should be placed under oath. Considering all the facts and circumstances there is probable cause to believe that marijuana is presently located in room 203.

3. The scope of the search is anywhere within room 203 where marijuana may be hidden, but particularly SPC Dealer's wall locker. Any other contraband discovered during the search is admissible as evidence and should be properly safeguarded (for fingerprints, chain of custody, identification).

4. The wall locker may certainly be searched. It is also reasonable that marijuana may be hidden elsewhere within the room, so the entire room may be searched. Nothing in Mason's statement indicated that Dealer's car was being used as part of his drug trade. The car is something the commander should always inquire about. Unless there is some information linking Dealer's car and the marijuana, the car is beyond the scope of the search. If the car is implicated, the battalion commander could authorize the search of a car parked in his battalion area. If the car is in the PX parking lot, it is best to have the installation commander or magistrate authorize the search, if there is time; but under the automobile exception, an authorization to search Dealer's car is not mandatory so long as there is probable cause that drugs are in the car.

5. A commander may authorize a search orally or in writing. Anyone, except the commander authorizing the search, may conduct the search. Safeguard any evidence found and notify the MPs.

6. It is always a good idea to ask for consent to search. Do not coerce Anderson into consenting by telling him "if you don't consent we have a warrant anyhow," but if he asks "what happens if I refuse," you should truthfully and accurately inform him that you have authorization to search his property. If Anderson refuses to unlock his wall locker, the searcher may cut the lock off.

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Incident #3. Your brigade XO is checking the motor pool. He sees a soldier from another battalion removing parts from three of your vehicles. The soldier stuffs the parts in his pockets, glances around hurriedly, and quickly begins to leave the motor pool.

1. Can the XO apprehend the soldier?

2. Does he need a search warrant or authorization to search the soldier? Why or why not?

3. If the XO searches him, what, if any, are the limits of the search?

Answers to Incident #3

Search Incident to Apprehension

1. Yes, an officer can apprehend a soldier when he has probable cause that a crime has been committed and the soldier is involved.

2. No, a search incident to apprehension (arrest search) does not require a warrant or authorization.

3. The limits of an arrest search are the person and the area immediately around him (within his "wingspan" or lunging distance). If apprehended in a car, the entire passenger compartment may be searched, but not the trunk.

Incident #4. You are the brigade commander. A CID agent calls you and says that he has apprehended one of your soldiers at the railroad station with 2 grams of marijuana in his coat pocket. The agent wants authority to search the soldier's room and wall locker.

1. What should you do?

2. Should you authorize the search? Why or why not?

Answers to Incident #4

CID Report

1. Consult with your trial counsel for advice. Ask the agent for more information. What facts would lead you to believe that there is marijuana in the soldier's room, wall locker, or car?

2. Presently there is insufficient information to authorize a search. There is, however, probable cause to order a urine test for use of marijuana.

Incident #5. One of your company commanders reports a barracks larceny--$500.00 and a new coat are missing from PVT Victim's wall locker. Three days later SPC Smith, who lives in the room next to Victim, buys a new stereo from the post exchange for $350. Victim, suspicious of SPC Smith, informs his commander, who calls you for advice.

1. What should you do?

2. Should you authorize a search based solely on this information?

Answers to Incident #5

Barracks Larceny

1. Consult with your trial counsel for advice. Get more information. What is PFC Smith's financial situation? What else does Victim know or suspect? Talk to Smith's roommates.

2. No. Suspicion alone, however strong, does not support a finding of probable cause to search. Continue the investigation until additional information is uncovered (such as a report about the coat, or Smith flashing new found money). The battalion commander must now be wary of his role as a neutral and detached magistrate. It can be argued that he is now directing the investigation as opposed to being kept informed of the investigation. Consider getting any subsequent search authorization from the brigade commander or military magistrate.

CHAPTER 5

SEARCH AND SEIZURE

TEACHING OUTLINE

I. The Fourth Amendment.

A. Requirements.

1. Searches must be reasonable.

2. Searches must be based on:

a. Probable cause.

b. Warrant or authorization.

B. Applicability.

1. Fourth amendment applies to soldiers.

2. Fourth amendment provides soldiers less protection than civilians

C. Exclusionary rule: items seized in violation of fourth amendment may not be used in court-martial.

II. Warrants and Probable Cause.

A. Search warrants in military are called search authorizations.

1. Search warrants must be in writing, under oath, and issued by a civilian magistrate.

2. Search authorizations may be oral, need not be under oath, and may be authorized by a military commander.

B. Warrants/authorizations must be based on probable cause. See Appendix A, page 5-19.

1. What is where and when?

2. How do you know?

3. Why should I believe you?

C. Who can authorize search.

1. Any commander of the place to be searched ("king-of-the-turf") may authorize search.

2. Preferable to use the military judge or magistrate: avoids problems and eliminates chance that commander may have to testify.

D. Commander must be neutral and detached.

1. Cannot be "investigator" and "judge" in same case.

2. Examples.

a. Commander is not neutral and detached when he or she:

(1) Orchestrates the investigation.

(2) Conducts the search.

b. Commander may be neutral and detached even though he or she:

(1) Is present at the search.

(2) Has personal knowledge of the suspect's reputation.

(3) Makes public comments about crime in his or her command.

(4) Is aware of an on-going investigation.

3. Alternatives:

a. Next higher commander.

b. Military magistrate.

III. Exceptions to Fourth Amendment.

A. Private searches (by roommate, friend, etc.).

B. Foreign searches.

C. Government property (unless issued for personal use).

D. Items in open view.

E. Exigent circumstances.

F. Consent.

G. Inspections.

1. Primary purpose of inspection must be administrative.

a. Administrative inspection.

(1) Primary purpose is administrative (ensure readiness, eliminate drugs from unit, etc.).

(2) Focus on unit problem.

(3) Must be reasonable (treat all the same).

b. Criminal search.

(1) Primary purpose is to gather evidence of crime.

(2) Usually follows specific crime (rape, larceny, drugs).

(3) Focus on specific person.

(4) Must be based on probable cause and warrant.

2. The subterfuge rule. An inspection is presumed to be an improper criminal search if it:

a. Immediately follows report of a specific offense; or

b. Targets specific soldiers; or

c. Subjects soldiers to substantially different intrusions.

3. Health and welfare inspections.

a. Articulate primary purpose:

(1) If primary purpose is administrative (ensure readiness, eliminate crime from unit), inspection is proper

(2) If primary purpose is to obtain evidence for an Article 15 or court-martial, inspection is improper.

(3) Inspection may have dual purpose so long as primary purpose is administrative.

b. Inspect everyone alike; do not target specific soldiers.

4. Lost weapon lock-downs.

a. Keeping all of the unit members in the unit area to continue to search for a lost weapon is a legitimate military purpose. It makes transfer of the missing item less likely and protects the community.

b. Mass punishment is not a proper purpose, although it is often perceived as a side-effect of a lock-down due to the inconveniences to soldiers and families.

5. Gate inspections.

   a. Prepare written instructions for guards.

   b. Post notice at gate.

   c. Technological aids (mirrors, drug dogs) may be used.

   d. Consider manpower and morale. Civilian employees delayed at gate may be entitled to overtime.

6. Inventories. Evidence obtained during proper inventory may be used against soldier.

IV. Urine Tests.

A. Four Kinds of Urine Tests.

		What test can be used for	
1.	Inspection	Disciplinary actions (court-martial, Art. 15)	Admin actions
2.	Probable cause	Disciplinary actions	Admin actions
3.	Consent	Disciplinary actions	Admin actions
4.	Fitness for duty		Selected admin actions only

B. Drugs tested.

1. Marijuana.

2. Cocaine.

3. "Drug of the week."

C. Tests used.

1. Initial test: radioimmunoassay test.

2. Confirmation test: gas chromatography/mass spectrometry test.

D. When you question the test results (for example, if a "super soldier" tests positive) you may consider:

1. Polygraph test.

2. Blood or DNA tests.

3. Hair test.

E. Defenses.

1. Passive inhalation (marijuana).

2. Spiked food or drink (marijuana and cocaine).

V. Conclusion.

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CHAPTER 6

SELF-INCRIMINATION, CONFESSIONS, AND IMMUNITY

Introduction

The fifth amendment protects a person from self-incrimination. To enforce this right enjoyed by all Americans, the Supreme Court decided in 1966 that before the police could talk to a suspect who was in custody, they had to advise him of his right to remain silent and that he could have a lawyer present during questioning. This was the case of Miranda v. Arizona.

A commander may ask - why do I need to know about rights warnings? There are a variety of situations where a commander may be required by law to warn an individual about their privilege against self-incrimination. In our military justice system, the commander plays a key law enforcement role. They frequently conduct investigations and regularly interview people as part of their investigation. In fact, Rule of Court-Martial 303 requires the commander to make a preliminary inquiry when a member of the command is accused or suspected of an offense triable by court-martial. Additionally, during the nonjudicial punishment process, the commander is required by AR 27-10 personally to determine whether the soldier committed an offense. Commanders also can appoint or be appointed to either formal or informal boards or investigations under AR 15-6. Finally, situations triggering a warning requirement may arise in the course of daily events, outside a structured investigatory proceeding.

In order to properly conduct an investigation or article 15 proceeding, the commander must talk to the persons involved in the incident. Those persons can be classified as witnesses or suspects. Witnesses are persons who have information about the incident, but did not do anything criminally wrong. You are not required to read rights warnings to witnesses before questioning them. Suspects are those persons you reasonably believe or should believe committed a criminal offense. A soldier may initially be a witness, but during the interview may reveal information that makes you suspect the soldier of involvement in a crime. At that point, the soldier should be treated as a suspect. The soldier-suspect has the same privilege against self-incrimination and right to counsel that other citizens have. You must, therefore, read rights warnings before

questioning a soldier suspected of committing an offense. The suspect may waive the rights and choose to make a statement or may invoke his or her rights. If a soldier invokes his or her rights, the questioning must immediately stop. At that point, the commander should consult with their trial counsel to determine how best to proceed.

If the suspect talks to you, it may be a statement, an admission, or a confession. A statement is a report of facts or opinions. An admission is a self-incriminating statement falling short of an acknowledgment of guilt. A confession is an acknowledgment of guilt. Mil. R. Evid. 304(c). If proper rights warnings have been given, admissions and confessions are admissible at trial against an accused and frequently will constitute the key evidence in the case. One further rule governs confessions - before being admitted, there must be independent evidence which corroborates the essential facts of the confession. Mil. R. Evid. 304(g). This protects the system from people who admit to crimes for publicity, because of mental imbalance, or because of improper police conduct.

A. Sources of the Rights

A soldier's privilege against self-incrimination and right to counsel come from four sources:

1. The Fifth Amendment.

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

2. Uniform Code of Military Justice.

   a. Article 31(a), UCMJ.

   > "No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."

   b. Article 31(b).

   > "No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of

an offense without first informing him. . . ."

3. The Sixth Amendment.

"In all criminal prosecutions, the accused shall . . . enjoy the right to have the Assistance of Counsel for his defence."

4. Army Regulations.

a. AR 15-6 - Investigations

(1) No military witness or respondent will be compelled to incriminate himself (see Article 31, UCMJ).

(2) No witness or respondent not subject to the UCMJ will be deprived of his rights under the Fifth Amendment.

b. AR 27-10 - Nonjudicial Punishment. The imposing commander will ensure that the soldier is notified of his right to remain silent and his right to consult with counsel.

c. AR 635-200 - Enlisted Personnel Separations.

Article 31, UCMJ will apply to board procedures.

d. This list of regulations is not exhaustive; other regulations also impose a rights warning requirement. Always review regulations governing a specific type of investigation or proceeding to decide if rights warnings are required.

B. Due Process Voluntariness

Any confession used as evidence must be voluntary. This is a fundamental requirement of the due process clause to the Constitution. Additionally, Article 31(d), UCMJ, prohibits the use of any statement obtained through the use of "coercion, unlawful influence, or

unlawful inducement." These protections are separate from the protections of rights warnings.

The courts have condemned such practices as beating the suspect, depriving the suspect of food, water, or sleep, threatening the suspect, removing the suspect's clothing, and interrogating the suspect for extremely long periods without a rest or break. Confessions obtained through the use of such tactics are not admissible because they are not voluntary.

C. Scope of the Rights

As originally adopted, both Article 31, UCMJ, and the fifth amendment to the Constitution applied only to criminal proceedings or where there is a risk of criminal prosecution. Army regulations, however, extend these protections to nonjudicial and administrative proceedings. When conducting an administrative investigation you should always check the governing regulations for provisions that require rights warnings.

Not all evidence provided by a soldier is protected by Article 31 or the Constitution. In order to be protected, the evidence must be both incriminating and "testimonial or communicative." Mil. R. Evid. 301(a). Clearly, oral and written statements fit the definition and are protected by the privileges. So are a soldier's actions that have a commonly understood meaning, such as nodding his or her head in response to a question.

Other evidence is not protected, even though it is gathered from a suspect, because it does not require the suspect to "communicate" or "testify" against himself or herself. Physical characteristics such as fingerprints, scars, tatoos, footprints, or trying on clothing are not protected. This evidence may be incriminating, but its value is in its physical characteristics, not in what the suspect tells you about it. The fingerprint of the suspect may have evidentiary value that is separate and apart from anything the subject may choose to say about the crime. If clothing found at a burglary scene fits the suspect, that may incriminate the suspect, but he or she is not required to say anything about the burglary. Likewise, body fluids such as blood or urine can incriminate a suspect, but the collection process does not require the suspect to testify or communicate information. Instead, the physical characteristics of the blood and urine are the important element. The same is true for voice and handwriting samples, even though they require the suspect's cooperation. The

investigator compares the physical aspects of the suspect's handwriting or voice prints to the physical aspects of the handwriting or voice of the person who committed the crime. The investigator is using the way the words were spoken, not what was spoken, and those physical characteristics are not protected. Finally, identification is not protected even though the soldier provides the information. This is because a person's identity is neutral information that does not tend to prove a crime. Accordingly, the commander can generally require a soldier to identify himself and produce his identification card, even though no rights warnings are given.

D. The Rights Warning Decision

You now know where rights warnings come from and what kind of evidence is protected, but how do you decide if you must actually read the rights warnings? The simple answer is: whenever you intend to conduct official questioning of a suspect or accused, you must read rights warning. Remember that simple phrase and you can't go wrong. Let's discuss each element in order.

1. Official.

Article 31 was enacted to protect soldiers from the subtle pressures to respond to questioning by a superior. Soldiers are trained to respond to orders. That training may cause them to respond to a superior's questioning because of rank, duty, or similar relationships, even though the response is incriminating. The warning makes it clear that the soldier is not required to respond.

The first part of the rule, then, is that rights warnings are required when the questioner is acting in an official capacity. Law enforcement personnel and commanders are almost always seen as acting in an official capacity. In contrast, when a soldier brags about criminal conduct in response to a friend's question, those statements may be used against the soldier because the friend is not acting in an "official" capacity and is not required to read rights warnings to the soldier. The soldier's act of bragging indicates that he or she did not feel pressured or coerced into talking about the crime, so the rationale underlying the rights warning requirement does not apply.

There is one exception to the official questioning rule. Undercover agents are not required to read rights warnings even though they are military police acting in an official capacity. Such a requirement would pose an obvious threat to the safety of undercover agents. More importantly, however, since the suspect does not realize he is dealing with a police officer or government agent, there are neither subtle nor coercive pressures that would justify rights warnings. There are, however, limitations on the use of undercover agents. Once a suspect has invoked his or her right to consult with an attorney, or has had charges preferred against him, the suspect is entitled to consult with counsel, to be given rights warnings again, and to have counsel present at any subsequent interrogation. A commander (or the police) cannot circumvent this rule by sending an undercover agent to question the suspect; the commander cannot use the undercover agent to do what the commander cannot do on his own.

2. Questioning.

Questioning is a broad term and includes any formal or informal words or actions that are designed to elicit an incriminating response. Mil. R. Evid. 305. If, in your official capacity, you are trying to get the soldier to tell you something that you can use against him or her, you are questioning the soldier. It is questioning, for example, if you bring a soldier suspected of stealing a rifle into your office and attempt to get a response by showing the soldier the recently recovered stolen weapon.

It is not questioning when a soldier volunteers information or spontaneously gives information without any "words or actions reasonably likely to elicit an incriminating response" from the commander. If you simply listen to the soldier, there is no requirement to stop the soldier and advise him or her of their rights. If you want to question the soldier after the volunteered information, then you must give rights warnings.

3. Suspect or accused.

You do not have to advise all soldiers of their rights before questioning them. Witnesses, who are not suspected or accused of offenses, need not be advised of any privilege against self-incrimination, even though you are conducting official questioning. A soldier is the "accused" after court-martial charges have been preferred against him. A soldier is a suspect when you

believe, or have enough information such that you reasonably should believe that the soldier committed an offense. The questioner cannot avoid rights warnings by simply saying that he did not suspect the soldier being questioned.

4. Summary.

When you officially question a suspect or accused, you must read the rights warnings prior to the questioning. If you must re-interview the suspect, you should complete another rights advisement before beginning your questioning.

E. Rights Warnings

Rights warnings should be read verbatim from DA Form 3881, Rights Warning Procedure/Waiver Certificate (Appendix A, page 6-12) or GTA 19-6-5, How To Inform Suspect/Accused Persons of Their Rights (Rights Warning Card) (Appendix B, page 6-13).

F. Voluntary Waiver of Rights

After reading the rights warnings to the suspect, ask these questions:

1. Do you understand your rights? (Yes)

2. Do you want a lawyer? (No)

3. Are you willing to make a statement? (Yes)

If the answers in the parentheses are given, the suspect has waived his or her rights and you may proceed with your interview. If the suspect doesn't understand his or her rights, explain them further; if he or she wants to remain silent or see an attorney, stop the interview, make a note of the request, and call your trial counsel. Be sure to specifically note whether the suspect wants to remain silent, have an attorney, or both. Different rules apply to each request.

In order to use a suspect's statement in a later court-martial, the trial counsel must prove that the suspect voluntarily waived his or her rights. If you obtained the statement, you may be called to testify about the rights warnings you gave and the suspect's waiver of those rights. This may be a long time after you actually took the statement, so it's important that you make a record of what occurred. If possible, use the DA Form 3881 because it provides not only a written

record of the rights warning, but also the suspect's signature which indicates the suspect waived his or her rights. If you use GTA 19-6-6 (rights warning card), you may wish to write the date and time of the rights advisement on the card and have the suspect place his initials by each of the rights warnings. A written memo can be prepared later. Although these steps are not required, they will assist you when testifying under oath about what happened during the rights warning process.

One final note: it is not permissible to use trickery to obtain a suspect's waiver of rights, e.g., telling a suspect his accomplice confessed, but laid the blame completely on him; or telling a suspect his fingerprints were found at the crime scene when none was found. If the suspect is tricked or mislead into waiving his or her rights, the waiver will be considered involuntary and the admission or confession will be ruled inadmissible at trial. The courts have allowed law enforcement agents to use some trickery in obtaining a confession, but only after the suspect freely and voluntarily agreed to talk. This is an area fraught with danger and should be avoided by commanders.

G. Presence of Counsel

Soldiers have an additional protection under Mil. R. Evid. 305(e).

If a soldier is represented by a defense counsel, or has requested to consult with a lawyer in response to custodial interrogation, the defense counsel must be present before a valid waiver may be obtained of that soldier's privilege against self-incrimination. Because this area is very complicated, contact your trial counsel before questioning a soldier who has either asked for a lawyer or is represented by a lawyer.

H. Remedy: Exclusion

If a questioner violates the requirements of the voluntariness doctrine, warnings, waiver, or notice to counsel, any statement obtained from a suspect which might have been used against the suspect at trial is excluded from evidence. Also, any evidence derived from the statement must be excluded. This may not, however, be the end of the government's case. If the trial counsel can prove the case with evidence which is independent of the inadmissible statement, the prosecution may go forward.

I. Immunity

When a soldier refuses to testify because of the privilege against self-incrimination, the soldier can be compelled to testify by immunizing the soldier from the incriminating results of his testimony. Immunity is the government's promise that the soldier's testimony will not be used against the soldier. Because the grant of immunity removes the criminal consequences of talking, the soldier must talk with authorities.

Rule of Court-Martial 704 sets out the procedures for granting immunity and specifies that only the General Court-Martial Convening Authority may grant immunity. There are two types of immunity:

1. Transactional immunity - the witness cannot be prosecuted at all for the criminal transaction that he testifies about. This is seldom used.

2. Testimonial immunity - the witness's testimony and derivative evidence cannot be used against him. Prosecution is possible if the government can show that all evidence is from an independent source, but this is very difficult for the government to do.

A soldier with a grant of immunity is not free from all subsequent prosecution. If the soldier lies or refuses to talk with government authorities, the soldier may be prosecuted for perjury, false swearing, making a false official statement, or failure to comply with an order to testify.

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APPENDIX A

RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE

For use of this form, see AR 190-30; the proponent agency is DCSPER.

DATA REQUIRED BY THE PRIVACY ACT

THORITY:	Title 10, United States Code, Section 3012(g).
CIPAL PURPOSE:	To provide commanders and law enforcement officials with means by which information may be accurately identified.
ROUTINE USES:	Your Social Security Number is used as an additional/alternate means of identification to facilitate filing and retrieval.
DISCLOSURE:	Disclosure of your Social Security Number is voluntary.

LOCATION	DATE	TIME	FILE NO.

NAME (Last · First · MI)	ORGANIZATION OR ADDRESS

SOCIAL SECURITY NO.	GRADE/STATUS

SECTION A · RIGHTS WAIVER/NON-WAIVER CERTIFICATE

RIGHTS

The investigator whose name appears below told me that he/she is with the United States Army _____

_____ and wanted to question me about the following offense(s) of

which I am suspected/accused: _____

Before he/she asked me any questions about the offense(s), however, he/she made it clear to me that I have the following rights:

1. I do not have to answer any questions or say anything.
2. Anything I say or do can be used as evidence against me in a criminal trial.
3. *(For personnel subject to the UCMJ)* I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both.

· *or* ·

(For civilians not subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. However, I understand that I must make my own arrangements to obtain a lawyer and this will be at no expense to the Government. I further understand that if I cannot afford a lawyer and want one, arrangements will be made to obtain a lawyer for me in accordance with the law.

4. If I am now willing to discuss the offense(s) under investigation, with or without a lawyer present, I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waiver below.

COMMENT *(Continue on reverse side)*

WAIVER

I understand my rights as stated above. I am now willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me.

WITNESSES *(If available)*	SIGNATURE OF INTERVIEWEE
1. NAME *(Type or Print)*	
ORGANIZATION OR ADDRESS AND PHONE	SIGNATURE OF INVESTIGATOR
2. NAME *(Type or Print)*	TYPED NAME OF INVESTIGATOR
ORGANIZATION OR ADDRESS AND PHONE	ORGANIZATION OF INVESTIGATOR

NON-WAIVER

I do not want to give up my rights:

☐ I want a lawyer. ☐ I do not want to be questioned or say anything.

ATURE OF INTERVIEWEE

ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT (DA FORM 2823) SUBSEQUENTLY EXECUTED BY THE SUBJECT SUSPECT/ACCUSED.

DA FORM NOV 84 3881 EDITION OF MAY 81 IS OBSOLETE.

SECTION B - RIGHTS WARNING PROCEDURE

THE WARNING

1. WARNING - Inform the suspect/accused of:

   a. Your official position.

   b. Nature of offense(s).

   c. The fact that he/she is a suspect/accused.

RIGHTS - Advise the suspect/accused of his/her rights as follows:

"Before I ask you any questions, you must understand your rights."

a. "You do not have to answer my questions or say anything."

b. "Anything you say or do can be used as evidence against you in a criminal trial."

c. *(For personnel subject to the UCMJ)* "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both."

- or -

(For civilians not subject to the UCMJ) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. However, you must make your own arrangements to obtain a lawyer and this will be at no expense to the Government. If you cannot afford a lawyer and want one, arrangements will be made to obtain a lawyer for you in accordance with the law."

d. "If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign a waiver certificate."

Make certain the suspect/accused fully understands his/her rights.

THE WAIVER

"Do you understand your rights?"
(If the suspect/accused says "no," determine what is not understood, and if necessary repeat the appropriate rights advisement. If the suspect/accused says "yes," ask the following question.)

"Do you want a lawyer at this time?"
(If the suspect/accused says "yes," stop the questioning until he/she has a lawyer. If the suspect/accused says "no," ask him/her the following question.)

"At this time, are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?"
(If the suspect/accused says "no," stop the interview and have him/her read and sign the non-waiver section of the waiver certificate on the other side of this form. If the suspect says "yes," have him/her read and sign the waiver section of the waiver certificate on the other side of this form.)

SPECIAL INSTRUCTIONS

WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE: If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation, and refuses to sign the waiver certificate.

IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY: In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.

PRIOR INCRIMINATING STATEMENTS:

(1) If the suspect/accused has made spontaneous incriminating statements before being properly advised of his/her rights he/she should be told that such statements do not obligate him/her to answer further questions.

(2) If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. The office of the serving Staff Judge Advocate should be contacted for assistance in drafting the proper rights advisal.

NOTE: If (1) or (2) apply, the fact that the suspect/accused was advised accordingly should be noted in the comment section on the waiver certificate and initialed by the suspect/accused.

MMENT *(Continued)*

HOW TO INFORM SUSPECT/ACCUSED
PERSONS OF THEIR RIGHTS

Use this card only when DA Form 3881, Rights Warning Procedure/Waiver Certificate, cannot be used. Complete DA Form 3881 as soon as possible.

VERBAL RIGHTS WARNING

Inform the person of your official position, the nature of the offense(s), and the fact that he/she is a suspect/accused. Then read him/her the following—do not paraphrase; read verbatim:

"BEFORE I ASK YOU ANY QUESTIONS, YOU MUST UNDERSTAND YOUR RIGHTS."

1. "YOU DO NOT HAVE TO ANSWER MY QUESTIONS OR SAY ANYTHING."
2. "ANYTHING YOU SAY OR DO CAN BE USED AS EVIDENCE AGAINST YOU IN A CRIMINAL TRIAL."
3. (For personnel subject to the UCMJ) "YOU HAVE THE RIGHT TO TALK PRIVATELY TO A LAWYER BEFORE, DURING, AND AFTER QUESTIONING AND TO HAVE A LAWYER PRESENT WITH YOU DURING QUESTIONING. THIS LAWYER CAN BE A CIVILIAN YOU ARRANGE FOR AT NO EXPENSE TO THE GOVERNMENT OR A MILITARY LAWYER DETAILED FOR YOU AT NO EXPENSE TO YOU, OR BOTH."

   (For civilians not subject to the UCMJ) "YOU HAVE THE RIGHT TO TALK PRIVATELY TO A LAWYER BEFORE, DURING, AND AFTER QUESTIONING AND TO HAVE A LAWYER PRESENT WITH YOU DURING QUESTIONING. THIS LAWYER CAN BE ONE YOU ARRANGE FOR AT YOUR OWN EXPENSE, OR IF YOU CANNOT AFFORD A LAWYER AND WANT ONE, A LAWYER WILL BE APPOINTED FOR YOU BEFORE ANY QUESTIONING BEGINS."
4. "IF YOU ARE NOW WILLING TO DISCUSS THE OFFENSE(S) UNDER INVESTIGATION, WITH OR WITHOUT A LAWYER PRESENT, YOU HAVE A RIGHT TO STOP ANSWERING QUESTIONS AT ANY TIME, OR SPEAK PRIVATELY WITH A LAWYER BEFORE ANSWERING FURTHER, EVEN IF YOU SIGN A WAIVER CERTIFICATE."

Make certain the suspect/accused fully understands his/her rights, then say:

"DO YOU WANT A LAWYER AT THIS TIME?"

"AT THIS TIME, ARE YOU WILLING TO DISCUSS THE OFFENSE(S) UNDER INVESTIGATION AND MAKE A STATEMENT WITHOUT TALKING TO A LAWYER AND WITHOUT HAVING A LAWYER PRESENT WITH YOU?"

(See DA Form 3881 for more detailed instructions.)
Department of the Army Graphic Training Aid
Supersedes GTA 19-6-6, July 1985 GTA 19-6-6, June 1991

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CHAPTER 6

CONFESSIONS, SELF-INCRIMINATION, AND IMMUNITY

TEACHING OUTLINE

I. SOURCES OF THE RIGHTS.

A. The Fifth Amendment. Right to silence.

B. Article 31, UCMJ. Military rights to silence.

C. The Sixth Amendment. Right to counsel.

D. Army Regulations.

II. SCOPE OF THE RIGHTS.

A. What is Protected? ". . . evidence of a testimonial or communicative nature." Mil. R. Evid. 301(a).

1. Written or oral statements.

2. Verbal acts.

B. What is Not Protected?

1. Physical Characteristics: fingerprints, footprints, scars, tatoos, trying on clothing, shaving a beard.

2. Body fluids - blood, urine.

3. Voice and handwriting samples.

4. Identification (e.g. line-ups and producing I.D. card).

III. QUESTIONING DURING INVESTIGATIONS.

A. Commanders and MP/CID Investigate.

B. Every Investigation Involves Talking to People.

1. Witnesses - rights warnings not required.

2. Suspects - rights warnings required.

C. Admission - statement admitting some elements of an offense. Admissible if proper rights warnings given.

Confession - statement admitting all elements of an offense. Admissible if proper warnings given and corroborating evidence exists.

IV. RIGHTS WARNING METHODOLOGY.

A. Who Must Warn? (Official)

1. "Subtle pressure" rationale.

2. Personnel acting in an official capacity (for law enforcement or disciplinary purposes).

3. Suspect perceives more than casual conversation.

4. Commanders generally presumed to be acting in official capacity.

B. When Must Warnings Be Given? (Questioning)

1. Words or actions can be questioning.

2. Spontaneous or volunteered statements are not questioning.

3. Requesting consent to search is not questioning, but warnings are recommended.

4. Successive questioning.

a. If you question again, read rights again.

b. Ask the chain of command and the police if they read the suspect his rights. Their knowledge is imputed to you.

c. Tell your chain of command and the police if you read the suspect his rights. Your knowledge is imputed to them.

C. Who Must Be Warned? (Suspect or Accused)

1. Accused--after preferral.

2. Suspect -- objective test.

D. The Rights Warnings.

V. VOLUNTARY WAIVER OF RIGHTS.

A. The Burden of Showing a Waiver is on the Government.

B. Be Prepared to Testify. Use GTA 19-6-6 or DA Form 3881, have a witness, prepare a memo.

C. If Rights are Invoked.

Stop the questioning and call your trial counsel.

VI. REMEDY: EXCLUSION.

A. Article 31(d). "No statement obtained in violation of this article . . . may be received in evidence against him in a trial by court-martial."

B. "An involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused. . . ." Mil. R. Evid. 304(a).

C. Non-evidentiary use also prohibited.

VII. PRESENCE OF COUNSEL.

A. Extra protection for servicemembers after attachment of Fifth or Sixth Amendment counsel rights.

B. Counsel may have to be present for effective waiver. Consult your trial counsel before conducting any questioning.

VIII. IMMUNITY.

A. Overcoming an invoked privilege against self-incrimination.

B. Concept: Remove the Consequences of Talking.

C. Types of Immunity.

1. Transactional immunity.

2. Testimonial immunity.

D. Only a GCMCA May Grant Immunity.

E. Immunity Landmines.

1. De Facto Immunity.

2. Regulatory Immunity.

3. Unlawful Inducements.

IX. SUMMARY.

Before you question a suspect you must give a rights warning. Use a rights warning form or card and, if possible, have a witness present. Be sure the suspect clearly answers the waiver questions. If the suspect invokes his rights, stop the questioning and call your trial counsel.

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CHAPTER 7

SENTENCING AND MILITARY CORRECTIONS

Introduction

Commanders are the cornerstone of the military justice system. When deciding whether to court-martial a soldier in their unit, commanders must remember that courts-martial serve two complementary purposes: enforcing unit discipline and administering justice.

What expectations should commanders have regarding court-martial sentences? The discussion that follows covers various aspects of sentencing. Commanders should consider these matters when determining what action to take on pending charges. Additionally, court members should consider these matters when determining an appropriate court-martial sentence.

A. Purposes of Punishment

An organization comprised of well-disciplined soldiers will carry out its mission and function efficiently. Although good leadership is the best method of achieving discipline, deterrence of crime and protection of the military community are closely associated with discipline. A few undisciplined soldiers in an organization can cause disciplinary problems to spread, and impair a unit's efficiency.

An essential ingredient of good leadership is fair treatment of subordinates by superiors. A soldier who is treated fairly will learn to respect the Army's disciplinary procedures. A sentence which is either too light or too severe can undercut discipline and result in disrespect for the law; whereas, fair sentences tend to foster good discipline and thereby protect the interests of the military community.

There are four recognized theories of punishment:

1. Retribution. Retribution has long been high on the list of reasons for punishment. Under this theory, the purpose of punishment is to make the offender pay for a crime by pain and suffering and to express the community's outrage and disappointment. The amount and type of punishment are based upon the offense(s). Retribution is based upon retaliation and vengeance. Punishment based upon retribution is not the dominant objective of modern criminal law. Today we believe that

punishment should fit the offender and not merely the crime.

2. Deterrence. A second purpose of punishment is deterrence. Deterrence has two objectives: to provide the offender with a sentence that deters him or her from committing future crimes (specific deterrence); and to dissuade others who might engage in similar criminal conduct (general deterrence). Deterrence is effective in punishing an individual only when he or she knows in advance that breaking the law will be followed by certain and swift punishment. As a result, commanders should publish court-martial findings and sentences throughout the command.

3. Rehabilitation. A recurrent theme of modern military penology is rehabilitation of the offender. The great majority of offenders come out of prison some day, and their sentences should be formulated to promote rehabilitation. Rehabilitation contemplates individualized treatment permitting the offender to return as a useful and productive member of society, whether military or civilian.

Under this theory, emphasis is placed on the offender as an individual, and the sentence is a means by which he or she can be compelled to receive individualized treatment which will help make him or her a useful and responsible member of society. The field of rehabilitation is controversial and in ferment but rehabilitation remains a core principle of the military justice system.

4. Protection of Society. The protection of society theory combines aspects of retribution, deterrence, and rehabilitation, but has its roots in one of the fundamental purposes of confinement: keeping dangerous or predatory offenders from victims and potential future victims. The fact that confinement is warranted for protection of society does not answer the next question: how long? That involves balancing all four sentencing factors.

5. Good Order and Discipline. The last judicially recognized purpose of punishment ties the others together. Good order and discipline means ensuring that the military community is safe, that a sense of justice exists in which criminal conduct is punished and good behavior is rewarded, and in which misbehaving soldiers are rehabilitated simultaneous with their punishment. Courts-martial entrust panel members to assess the impact of the crime on good order and discipline and to consider

how good order and discipline can be buttressed by a fair and just sentence.

B. Functions of the Commander

1. Disposition of Cases. Congress has given disciplinary powers to certain members of the armed forces as a public trust. These powers must be exercised in the name of the United States in a manner befitting this trust.

A commander must be aware of the severity of punishments which may be adjudged by the various forums in order to make an intelligent disposition of or recommendation regarding the case.

The initial punishing authority is required by law to exercise absolute and unfettered individual judgment. One should not be concerned with possible future actions of higher authority on the punishment; rather the punishing authority should adjudge an appropriate punishment under the circumstances of the case.

2. Review. As a convening authority, the commander refers charges to the lowest court that has the power to adjudge an appropriate sentence. As the reviewing authority, the commander approves the sentence or part of the sentence found to be correct in law and fact and determined to be appropriate.

REFERENCE: R.C.M. 1107.

C. Duties as a Court Member

1. In General. Court members deliberate and vote after the military judge instructs them on sentence. Only the members are present during deliberations and voting. Panel members may not use seniority in rank to control the independence of junior members in the exercise of their judgment.

2. Deliberations. Deliberations include a full and free discussion of the sentence to be imposed in the case. Members may normally take their notes with them during deliberations and will also be allowed to examine any exhibits which have been admitted and any written instructions. If requested, the military judge may allow the court to be reopened to allow the members to have portions of the record played back or to have more evidence introduced.

3. Proposal of Sentences. Any member may propose a sentence. Each proposal shall be in writing and shall contain the complete sentence proposed. The junior member collects the proposed sentences and submits them to the president.

4. Voting. Each member votes for a proper sentence for the offenses of which the court-martial found the accused guilty, regardless of the member's vote or opinion as to the guilt of the accused. The president places the sentence proposals in voting order beginning with the least severe. The vote is by secret written ballot beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted by the concurrence of the number of members required under the circumstances. Normally, a two-thirds vote is required to adopt a sentence; however, a three-quarters vote is required for sentences that include more than 10 years of confinement, and a unanimous vote is required to impose the death penalty.

REFERENCE: R.C.M. 1006.

D. Matters to Consider

Anyone who attempts to judge another's conduct should be aware of what is involved. Court members must make an impartial diagnosis of the problem and must understand the remedies available within the military. In most civilian jurisdictions, the judge--not the jury--imposes sentence on a convicted offender. A thorough investigation of the offender's record, termed the "presentence report," is prepared to assist the judge in assessing a proper sentence. In the military, either the judge or the court members arrive at an appropriate sentence; there is no presentence report. Court-martial procedure authorizes both the prosecution and defense to present, after findings, certain material which will assist the court in determining the kind and amount of punishment.

1. Aggravation. The Government presents admissible evidence of the accused's record. Regardless of the plea, after findings of guilty, the trial counsel may present evidence directly related to the offense for which an accused is to be sentenced so that the aggravating circumstances are understood by the sentencing body.

In addition to matters in aggravation, the trial counsel may present evidence of admissible prior

convictions and matters from the personnel records of the accused which reflect past conduct or performance, including any Article 15s which are properly maintained in the accused's personnel records. Finally, the trial counsel may call witnesses to express opinions about the accused's past duty performance and potential for rehabilitation as a member of society. The trial counsel may not inquire into the specific bases of witnesses' opinions on duty performance and potential for rehabilitation unless the witness has been cross-examined on this issue by the defense.

REFERENCE: R.C.M. 1001(a), (b).

2. Extenuation. Matters in extenuation of an offense serve to explain the circumstances surrounding the commission of the offense, including the reasons that motivated the accused. For example, an accused convicted of a 5-day AWOL may explain the absence by relating a chain of events involving the death of a close relative, which at the time seemed to justify the unauthorized absence.

While this does not excuse the absence, it may help explain why this accused acted, and such an explanation, could motivate a court to be lenient.

3. Mitigation. Matters in mitigation of an offense serve to bring to the court's attention evidence of the accused's prior good conduct, background, character of service, responsibilities, and other reasons that indicate leniency may be appropriate.

The military judge will allow the defense counsel latitude at this stage of the proceedings. For example, a properly authenticated letter from the accused's high school principal detailing the accused's good background could be considered as a matter in mitigation.

Also, examples of specific acts of bravery or prior good conduct may be presented. Proof may include prior conduct and efficiency ratings of the accused or witnesses who testify as to the accused's prior good conduct. The accused may also bring awards and decorations to the attention of the court. The accused may make a sworn or unsworn statement to the court. If the accused elects to make a sworn statement, the prosecution may cross-examine. If the accused makes an unsworn statement, the trial counsel may not cross-examine the accused about the statement but can rebut any factual inaccuracies with contradictory evidence. The accused may also elect to have counsel make an unsworn

statement on his or her behalf even if the accused testifies.

REFERENCE: R.C.M. 1001(c).

E. Punishment Limitations and Effective Dates

1. General. The various types of punishment available to the sentencing authority are limited in two ways: (a) the sentence may not exceed the jurisdiction of the court-martial as to punishment; and (b) the sentence may not exceed the limitations on punishment for the convicted offense(s) defined in Part IV of the Manual for Courts-Martial.

2. Reprimand. Any court-martial may impose a reprimand as a lawful punishment. If a reprimand is imposed, the members do not determine the wording of the reprimand. Rather, the convening authority issues the reprimand as a part of the action.

3. Forfeiture of Pay. Forfeitures are a permanent loss of pay coming due in the future. The amount of the forfeiture depends on the base pay due the member at the grade to which he or she is reduced. Forfeitures are effective on action by the convening authority.

4. Fine. All courts-martial have the authority to adjudge fines instead of forfeitures. While a forfeiture deprives the accused of pay as it accrues, a fine is a judgment making the accused immediately liable to the United States for the total amount of money specified. General courts-martial have the power to adjudge fines in addition to forfeitures. Special and summary courts-martial have authority to impose fines as well as forfeitures so long as the combined amount is no greater than two-thirds pay per month. Fines should normally not be adjudged unless the accused was unjustly enriched as a result of the offenses committed. Fines are effective on action by the convening authority.

5. Reduction in Grade. General and special courts-martial may reduce enlisted soldiers to the lowest or any intermediate enlisted grade. A reduction carries both the loss of military status and corresponding reduction of military pay. Any enlisted soldier who receives an approved sentence of confinement or a BCD will be reduced to private E-1 by operation of law (Art 58(a)). A commissioned or warrant officer, or a cadet or midshipman may not be reduced in grade by any court-martial, except that, in time of war or national

emergency, the Secretary concerned may commute a sentence of dismissal to reduction to any enlisted grade. Reductions are effective on action by the convening authority. Thus it is wrong for a commander or first sergeant to remove the stripes of a soldier sentenced to reduction immediately after a court-martial. The soldier retains his or her rank until the convening authority approves the reduction and orders it executed.

6. Restriction. Restriction is a moral restraint requiring that an individual remain within a specific geographic area. For example, a sentence could include restriction to the company area. Regardless of the level of the court-martial, restriction may not exceed 60 days. In order to aid in the enforcement of this punishment, a person undergoing restriction may be required to report to a specified individual at a specified time. Restriction is effective upon convening authority action.

7. Hard Labor Without Confinement. A sentence to hard labor without confinement envisions an individual performing hard labor during available time in addition to regular military duties. Normally, the immediate commanding officer of the accused will determine the nature and amount of the duties that will constitute the hard labor. Hard labor without confinement may be adjudged only for enlisted soldiers. Hard labor without confinement may not exceed three months for a general or special court-martial and 45 days for a summary court-martial. A summary court-martial is without authority to impose hard labor without confinement upon enlisted soldiers E-5 and above. This punishment is effective upon convening authority action.

8. Confinement. Only a general court-martial may impose confinement upon a commissioned officer or a warrant officer. A special court-martial may adjudge confinement for six months. A summary court-martial may confine an enlisted soldier below the grade of E-5 for one month. Confinement is effective immediately after the court-martial.

9. Bad-Conduct Discharge (BCD). Only enlisted soldiers may receive bad-conduct discharges. Bad-conduct discharges may only be adjudged by a general court-martial or by a special court-martial specifically authorized to impose a bad-conduct discharge. In order for a special court-martial to impose a bad-conduct discharge, the court must have been convened by a general court-martial convening authority. The bad-conduct discharge is less severe than a dishonorable discharge and is designed as a punishment for bad conduct rather

than as a punishment for serious offenses of either a civil or military nature. A bad-conduct discharge is effective only after appellate review is completed.

10. Dishonorable Discharge (DD). A dishonorable discharge may be adjudged only by general courts-martial and may be imposed upon appointed warrant officers and enlisted soldiers. The Manual for Courts-Martial provides that a dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized by the civilian legal system as felonies, or offenses of a military nature requiring severe punishment. A dishonorable discharge is effective only after appellate review is completed.

11. Dismissal. A dismissal may only be adjudged by a general court-martial and only upon commissioned officers and commissioned warrant officers. It is the equivalent of a punitive discharge (BCD, DD). Dismissal may be adjudged for any violation of any article of the UCMJ (i.e. not only those for which a BCD or DD is authorized). A dismissal is effective after appellate review is completed.

12. Death Penalty. The death penalty may be adjudged only if an accused is unanimously convicted of certain offenses, (for example, premeditated murder or espionage) at a court-martial specifically empowered to adjudge the death penalty. A death sentence may not be adjudged unless all the court members find, beyond a reasonable doubt, that one or more aggravating factors exist. An example of an aggravating factor for premeditated murder is that the victim was a commissioned, warrant, or noncommissioned officer in the execution of the victim's office. If one or more aggravating factors are found beyond a reasonable doubt, a sentence of death may be adjudged only upon the unanimous vote of all the members that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances. A sentence of death includes a dishonorable discharge or dismissal, and confinement as a necessary incident of a sentence of death but not a part of it. A sentence of death may not be suspended. The death penalty is effective only after appellate review is completed and after it is ordered executed by the President.

REFERENCE: R.C.M. 1003.

F. Reduction in Grade (Article 58a, UCMJ)

Article 58a is an important provision of the Uniform Code of Military Justice. The provision applies to three situations. If an enlisted soldier in the Army is sentenced to: (1) a dishonorable or a bad conduct discharge; (2) any confinement; or (3) any hard labor without confinement, then the enlisted soldier is automatically reduced to the grade of Private E-1 (even if the court did not expressly include such a reduction in its sentence) at the time the convening authority takes action on the sentence. Thus, if an approved court-martial sentence includes hard labor without confinement, Article 58a would reduce the soldier automatically to Private E-1 upon the convening authority's approval of the sentence. To determine when the provision applies, look to the approved sentence. Recognizing that in some cases the reduction may be more severe than any confinement adjudged, a convening authority may desire to lessen the blow by not approving that portion of the sentence which would bring Article 58a into operation. The Air Force and Navy do not have this rule.

G. Additional Punishments (Recidivist Provisions)

R.C.M. 1003(d) of the Manual for Courts-Martial sets forth a number of circumstances which authorize increased punishment beyond that authorized by the maximum punishment listed in Part IV.

1. Three or More Convictions During the Past Year. If an accused has three or more previous convictions during the year prior to the commission of any offense for which he or she is convicted, the court may adjudge a dishonorable discharge, total forfeitures, and confinement for one year notwithstanding the lesser punishments authorized for the offense.

2. Two or More Convictions During the Past Three Years. If an accused has two or more previous convictions during the three years prior to the commission of any offense for which he or she is convicted, the court may adjudge a bad-conduct discharge, total forfeitures, and confinement for three months notwithstanding the lesser punishments authorized for the offense.

3. Offenses - Six Months. Finally, if an accused is found guilty of two or more offenses, none of which authorizes a bad-conduct discharge but the combined authorized confinement exceeds six months, the court-martial may also impose a bad-conduct discharge.

These rules are important to you as a commander both in your role as a court member arriving at a sentence and in your role as a convening authority seeking to dispose of a case. For example, if you are a convening authority confronted with an accused who has committed two offenses for which no BCD is authorized, your immediate reaction may be to convene a special court-martial despite the fact that you feel the offender should be punitively discharged. If the authorized confinement for the offenses exceeds six months, you may forward the case to a general court-martial convening authority with a recommendation that the case be referred to a special court-martial authorized to impose a bad-conduct discharge.

REFERENCE: R.C.M. 1003(d).

H. Powers of the Convening Authority with Regard to Sentence

1. Review. The convening authority shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused. There is no requirement that the convening authority approve the sentence adjudged by the court. The convening authority may not, however, increase the sentence imposed by the court.

2. Alternatives. The convening authority may decide upon one of three courses of action when reviewing the sentence imposed by the court-martial. The convening authority may approve the sentence without change, approve a less severe sentence, or disapprove the entire sentence.

3. Legal Sentence. Many factors are involved in a commander's exercise of his discretion as the convening authority to approve a sentence which he or she feels is appropriate. The convening authority has a duty to approve only so much of a sentence as is legal. For example, if a summary court-martial sentences an accused to confinement for three months, the convening authority can only approve so much of the sentence as amounts to confinement for one month (the maximum sentence to confinement a summary court-martial legally can impose).

4. Suspension. The convening authority may take mitigating action by suspending all or part of a sentence. Suspension creates a probationary period for the accused. The period of suspension and the conditions

upon which the suspension is granted are within the discretion of the convening authority. The suspension must be for a reasonable time, and in no case may the suspension extend beyond the current enlistment of the offender. (See also Army Reg. 27-10, Legal Services: Military Justice, para. 5-29 (8 August 1994), that defines "reasonable periods" of suspensions.) Suspending sentences is a rehabilitative tool that may be appropriate in certain circumstances. R.C.M. 1108 governs the suspension process and commanders should consult with their staff judge advocates before ordering any suspension.

Should the offender commit another offense while serving a suspended sentence, the suspension may be vacated. If the case involves a bad-conduct discharge or a general court-martial sentence, a hearing must be held before the suspension can be vacated. The staff judge advocate should be consulted in such cases as there are important procedural requirements.

5. Reduction in Sentence. In addition to having the ability to suspend punishments, the convening authority may remit or commute the sentence in whole or in part. This authority does not extend to a death sentence. Reductions in sentences are usually due to special circumstances and are always considered on a case-by-case basis. Examples of when a reduction in sentence may be appropriate are when a family requires support and substantial forfeitures have been adjudged, or when a co-accused has been sentenced to a significantly less severe sentence and the interests of justice would be served by the reduction.

6. Deferment of Confinement. If the accused has been sentenced to a term of confinement, he or she may petition the convening authority to defer the service of confinement. The accused has the burden of showing that the interests of the accused and the community in release outweigh the community's interests in immediate and continued confinement. Among the factors which the convening authority can consider are the nature of the offenses, the effect of the crime on the victim, the command's need for the accused, and the effect of deferment on good order and discipline in the command. The commander's decision must be in writing and must state the basis for denial. Denial of a request for deferment is subject to judicial review only for abuse of discretion. If deferment is granted, the commander can include appropriate restrictions or conditions on the accused during the period of deferment. For example, the accused may be ordered not to enter a certain service

club, housing area, or geographic area. These conditions must not be a substitute form of punishment. After deferment is granted, the convening authority may rescind the deferment, but the accused is entitled to notice and an opportunity to be heard.

7. Excess Leave. If an approved sentence includes an unsuspended dismissal or punitive discharge, the general court-martial convening authority may direct the soldier to take excess leave involuntarily to await discharge. Confinement included as part of the approved sentence must have been served, deferred, or suspended prior to the beginning of leave. A soldier does not accrue pay or allowances while on excess leave awaiting discharge.

REFERENCE: R.C.M. 1101(c); 1107; 1108; Para. 5-4, AR 630-5.

I. Problem Areas

1. Inconsistent Sentences. Commanders should be aware of two problem areas with respect to inconsistent sentences. Occasionally, a court-martial may adjudge a sentence which includes confinement for one month and a reduction to E-4. As explained, under Article 58(a), UCMJ, any confinement automatically reduces the soldier to the grade of E-1. The question in such a situation is what the court intended: a one-grade reduction or confinement regardless of the included reduction?

Another problem of a similar nature involves a sentence to a suspended bad-conduct discharge. Only the convening authority can suspend a sentence, not the court. The question is, would the court have awarded a bad-conduct discharge if they had known that the suspension would have no effect? In either event, the staff judge advocate should be consulted.

2. Improper Forfeitures. The wording of the sentence is critical in adjudging or approving forfeitures. A sentence which reads "forfeiture of $40 for six months" amounts to a total forfeiture of $40. On the other hand, a sentence which reads "forfeiture of $40 pay per month for six months" amounts to a forfeiture of a total of $240.

J. Confinement Facilities

1. United States Disciplinary Barracks (USDB). The USDB is located at Fort Leavenworth, Kansas. The general rule is that the USDB confines enlisted long-term prisoners (defined as more than one year remaining on a sentence after convening authority action and initial clemency consideration). In practice, Army prisoners with sentences in excess of five years are transferred to the USDB. Additionally, the USDB confines long-term prisoners from other services, as well as all officer prisoners (regardless of length of sentence).

The mission of the USDB is two-fold: (a) to confine prisoners who are legally sentenced to confinement under the provisions of the UCMJ in a safe, secure environment; and (b) to provide the correctional treatment, training, care, and supervision necessary to return inmates to civilian life as useful, productive citizens with improved attitudes and motivation. Military discipline and courtesy are maintained within the USDB. Discipline and Adjustment Boards, convened by the Commandant of the USDB, review alleged violations of institutional rules and make recommendations to the Commandant for corrective action. The rules, programs, and activities of the USDB are discussed in USDB Regulation 600-1.

Shortly after arrival at the USDB, every inmate is evaluated by the staff of the Directorate of Mental Health. Specialized treatment is provided for many categories of inmates, such as child sex offenders and alcohol or drug abusers. The inmates also receive vocational training to prepare them for civilian employment.

2. Regional Confinement Facilities (RCF). Multi-service Regional Confinement Facilities are located throughout CONUS. The Army currently operates facilities at Fort Lewis, Washington; Fort Carson, Colorado; Fort Sill, Oklahoma; and Fort Knox, Kentucky. The Army also operates OCONUS facilities in Germany, Panama, Korea, and Alaska. Regional facilities operated by the Navy, Air Force, and Marines are also available for confinement of Army enlisted prisoners. The general rule is that Army enlisted prisoners with sentences that include confinement up to and including five years are confined at the nearest Regional Confinement Facility.

Inmates who engage in misconduct are subject to Disciplinary and Adjustment Boards, punishment under the UCMJ, or possible transfer to the USDB. All prisoners assigned to the Regional Confinement Facilities receive

individual evaluation, counseling, and treatment by social workers.

3. Installation Detention Facility (IDF). The 13 stateside IDFs have been replaced with the Regional Confinement Facilities. Four OCONUS IDFs remain at Mannheim, Federal Republic of Germany, Camp Humphreys, Korea, Fort Clayton, Panama, and Fort Richardson, Alaska. These OCONUS facilities are used for pretrial confinement and for post-trial confinement pending transfer to one of the CONUS RCFs.

SENIOR OFFICER LEGAL ORIENTATION

SENTENCING AND CORRECTIONS

I. INTRODUCTION.

II. PURPOSES OF PUNISHMENT.

A. Retribution.

B. Deterrence.

C. Protection of society/protection of the victim.

D. Rehabilitation.

E. Good order and discipline.

III. COURT-MARTIAL PUNISHMENTS.

A. No punishment.

B. Reprimand.

C. Forfeiture of pay and allowances.

D. Fine.

E. Reduction in pay grade.

F. Restriction to specified limits.

G. Hard labor without confinement.

H. Confinement.

I. Punitive separations.

1. Bad conduct discharge.

2. Dishonorable discharge.

3. Dismissal.

J. Death.

IV. PRESENTENCING PROCEDURE.

A. Government performance and aggravation evidence.

B. Defense extenuation and mitigation.

C. Argument by counsel.

V. SENTENCING PROCEDURES.

A. Full and free discussion.

B. Sentences proposed.

C. Ranking of sentences.

D. Voting.

1. Secret written ballot.

2. Start with least severe.

3. The required concurrence.

a. Normally 2/3.

b. 10 yrs. or more of confinement - 3/4.

c. Death - unanimous.

E. The sentence worksheet.

VI. CONVENING AUTHORITY'S POST-TRIAL RESPONSIBILITIES.

A. Initial action.

1. Command prerogative.

2. Must consider result of trial, SJA's recommendation, and any matters submitted by the accused.

3. May consider result of trial, accused's personnel records, and other appropriate matters.

4. May correct legal errors.

5. May act on the findings.

6. Must explicitly act on sentence.

B. Promulgating Order.

VII. CONFINEMENT.

A. Old System.

B. Consolidated DOD Confinement System.

1. Regional Confinement Facilities (RCFs).

2. United Stats Disciplinary Barracks, Fort Leavenworth, Kansas - All officers and long-term prisoners.

3. Four Army RCFs: Forts Knox, Lewis, Carson and Sill.

4. Long-term prisoners.

5. Short-term prisoners.

C. Clemency and parole.

1. Clemency.

2. Parole.

3. Good time.

VIII. COLLATERAL CONSEQUENCES.

A. Housing.

B. Medical benefits.

C. Educational benefits.

D. Veterans Administration benefits.

E. Retirement benefits.

IX. FACTS OF THE CASE.

X. THE VOTE.

XI. CONCLUSION.

APPENDIX A

General Court-Martial Sentence Worksheet

After the Court has reached a sentence, the President shall circle the punishment(s) selected and accomplish any filling in or crossing out within the punishments selected.

_____, this court-martial sentences you:

1. To no punishment.

Reprimand

2. To be reprimanded.

Forfeitures, Etc.

3. To forfeit $_____ pay per month for _____ month(s).

4. To forfeit all pay and allowances.

5. To pay the United States a fine of $_____ (and to serve (additional) confinement of _____ (days/months/years) if the fine is not paid).

Reduction of Enlisted Personnel

6. To be reduced to _____.

Restriction

7. To be restricted to the limits of _____ for _____ (days/months).

Hard Labor

8. To perform hard labor without confinement for _____ (days/months).

Confinement

9. To be confined for _____ (days/months/years) (the length of your natural life).

Punitive Discharge

10. To be discharged from the service with a bad-conduct discharge (enlisted personnel only).

11. To be dishonorably discharged from the service (enlisted personnel and noncommissioned warrant officers only).

12. To be dismissed from the service (commissioned officers, commissioned warrant officers, cadets, and midshipmen only).

Appellate Exhibit ____

JAGS-ADC 1 January 1995

Information Memorandum

SUBJECT: Prisoner Transfer Criteria

1. The following guidelines control the transfer of post-trial confinees:

< or = 5 Yrs	Ft Knox RCF, Ft Lewis RCF, Ft Sill RCF, Ft Hood RCF, Ft Carson RCF, as well as other service RCFs
> 5 Yrs and all officers	Disciplinary Barracks at Ft Leavenworth

2. Overseas short-term facilities are: Coleman Barracks at Mannheim, Germany; Camp Humphreys, Korea; Quarry Heights, Panama; and Fort Richardson, Alaska. Prisoners will be transferred at the earliest opportunity to a CONUS facility.

BENEFITS-DISCHARGES

	Honorable OFF & EM DD Form 256A	General[4] OFF & EM DD Form 257A Under Honorable Conditions	Other Than Honorable[5] OFF DD Form 794A EM DD Form 258A	Bad Conduct EM DD Form 259A Under Conditions Other Than Honorable	Dishonorable (General Court-Martial) EM & WO DD Form 260A (Including Dismissal of an Officer)[6]	AUTHORITY AND REFERENCES[7]
BENEFITS ADMINISTERED BY THE ARMY						
1. Payment for Accrued Leave	E	E	NE	NE	NE	37 USC 501-503; DODPEM par. 40401a
2. Death Gratuity (six months pay)	E	E	E	E	NE	10 USC 1480; DODPEM par. 40501b
3. Transportation to Home[1]	E	E	E	E	E	37 USC 404; JTR par. ~~M5301-M5305~~ U7500-7506 U5345-U5370
4. Transportation of Dependents and Household Goods to Home	E	E	TBD ~~NE~~[4]	TBD ~~NE~~[4]	TBD ~~NE~~[4]	37 USC 406; JTR par. ~~M7103; par. M7009~~
5. Wearing of Military Uniform	E	E	NE	NE	NE	10 USC 771a. 772; AR 670-1
6. Admission to Soldiers' Home[2]	E	E	NE	NE	NE	24 USC 49. 50
7. Burial in Army National Cemeteries	E	E	NE	NE	NE	38 USC 1002; AR 290-5
8. Burial in Army Post Cemeteries[3]	E	E	NE	NE	NE	AR 210-190
9. Army Board for Correction of Military Records	E	E	E	E	E	10 USC 1552; AR 15-185
10. Army Discharge Review Board	E	E	E	NE[9]	NE	10 USC 1553; AR 15-180
BENEFITS ADMINISTERED BY THE VETERANS ADMINISTRATION[10]						
1. Dependency and Indemnity Compensation	E	E	TBD	TBD	NE	38 USC 410(c)
2. Pension for Non-Service-Connected Disability or Death	E	E	TBD	TBD	NE	38 USC 521; 38 USC 3103
3. Medal of Honor Roll Pension	E	E	TBD	TBD	NE	38 USC 562; 38 USC 3103
4. Insurance	E	E	TBD[11]	TBD[11]	TBD[11]	38 USC 711, 773; AR 608-2.
5. Vocational Rehabilitation (DV)	E	E	TBD	TBD	NE	38 USC 1502. 1503
6. Educational Assistance (including Flight Training & Apprentice Training)	E	E	TBD	TBD	NE	38 USC 1652; 38 USC 1661. 1662
7. Survivors & Dependents Educational Assistance	E	E	TBD	TBD	NE	38 USC 1701-1765
8. Home and other Loans	E	E	TBD	TBD	NE	38 USC 1802. 1818
9. Hospitalization & Domicillary Care	E	E	TBD	TBD	NE	38 USC 610; 38 USC 3103
10. Medical and Dental Services	E	E	TBD	TBD	NE	38 USC 612; 38 USC 3103
11. Prosthetic Appliances (DV)	E	E	TBD	TBD	NE	38 USC 614; 38 USC 612(d); 38 USC 3103
Guide Dogs & Equipment For Blindness (DV)	E	E	TBD	TBD	NE	38 USC 614; 38 USC 3103
Special Housing (DV)	E	E	TBD	TBD	NE	38 USC 801; 38 USC 3103
Automobiles (DV)	E	E	TBD	TBD	NE	38 USC 1901; 38 USC 3103
15. Funeral and Burial Expenses	E	E	TBD	TBD	NE	38 USC 902; 38 USC 3103
16. Burial Flag	E	E	TBD	TBD	NE	38 USC 901; 38 USC 3103
17. Burial In National Cemeteries	E	E	TBD	TBD	NE	38 USC 1002
18. Headstone Marker	E	E	TBD	TBD	NE	38 USC 906; 38 USC 1003
BENEFITS ADMINISTERED BY OTHER FEDERAL AGENCIES						
1. Preference for Farm Loan (Department of Agriculture)	E	E	E	E	NE	7 USC 1983(e)
2. Preference for Farm and other Rural Housing Loans (Department of Agriculture)	E	E	E	E	NE	42 USC 1477
3. Civil Service Preference (Office of Personnel Management)	E	E	NE	NE	NE	5 USC 2108. 3309-3316. 3502. 3504
4. Civil Service Retirement Credit	E	NE	NE	NE	NE	5 USC 8331. 8332
5. Reemployment Rights (Department of Labor)	E	E	E	E	NE	38 USC 2021-2026
6. Job Counseling and Employment Placement (Department of Labor)	E	E	E	E	NE	38 USC 2001-2014
7. Unemployment Compensation for Ex-Servicemembers (Department of Labor)	E	TBD	NE	NE	NE	5 USC 8501. 8521
8. Naturalization Benefits (Department of Justice Imm. & Nat. Service)	E	E	NE	NE	NE	8 USC 1439, 1440; AR 608-3, par. 2-2. 2-3
9. Old Age, Survivors & Disability Insurance (Social Security Administration)	E	E	TBD	TBD	NE[12]	42 USC 417
10. Job Preference, Public Works Projects[13] (Department of Commerce)	E	E	TBD	TBD	NE	42 USC 6706; 13 CFR 317.35

GENERAL ELIGIBILITY. The eligibility of benefits set forth are not the sole determining factors, but only list the effect of the various types of discharge. The states also provide various benefits that will be influenced by the type of discharge, but information on state benefits should be obtained from state agencies.

E — Eligible
TBD — To Be Determined by agency administering the benefit
NE — Not Eligible
DV — Eligibility for these benefits depend upon specific disabilities of the veteran

DA POSTER 360-1, AUGUST 1984
[illegible]

FOOTNOTES

1. Only if no confinement is involved, or if confinement is involved, parole or release is from a US military confinement facility or a confinement facility located outside the US.
2. The statute provides that the veteran must have served "honestly and faithfully" for 20 years or been disabled and excludes convicted felons, deserters, mutineers, or habitual drunkards unless rehabilitated.
3. Only if an immediate relative is buried in the cemetery.
4. This discharge category includes the discharge of an officer under honorable conditions but under circumstances involving serious misconduct. See AR 635-100, par. 1-4b.
5. This discharge category includes the discharge of an officer under other than honorable conditions. See AR 635-100, par. 1-4c.
6. An officer who resigns for the good of the service (usually to avoid court-martial charges) will be ineligible for benefits administered by the Veterans Administration. 38 USC 3103
7. Additional references include Once a Veteran: Rights, Benefits and Obligations, DA Pam 360-526; and Federal Benefits for Veterans and Dependents. (VA Fact Sheet 1S-1).
8. ~~[illegible]~~
9. Only if the Bad Conduct Discharge was the result of conviction by General Court-Martial.
10. Benefits from the Veterans Administration are not payable to (1) a person discharged as a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise comply with lawful orders of competent military authority, (2) by reason of a sentence of a general court-martial, (3) resignation by an officer for the good of the service, (4) as a deserter, and (5) as an alien during a period of hostilities. 38 USC 3103. A discharge (1) by acceptance of an other than honorable discharge to avoid court-martial (2) for mutiny or spying, (3) for a felony offense involving moral turpitude, (4) for willful and persistent misconduct, or (5) for homosexual acts involving aggravating circumstances or other factors is considered to have been issued under dishonorable conditions and thereby bar veterans benefits. 38 CFR 3.12. A discharge under dishonorable conditions from one period of service does not bar payment if there is another period of eligible service on which the claim may be predicated (Administrator's Decision, Veterans Admin. No. 655, 20 June 1945).
11. Any person guilty of mutiny, spying, or desertion, or who because of conscientious objections, refuses to perform service in the Armed Forces or refuses to wear the uniform shall forfeit all rights to National Service Life Insurance and Servicemember's Group Life Insurance. 38 USC 711, 773
12. Applies to Post-1957 service only. Post-1957 service qualifies for Social Security benefits regardless of type of discharge. Pre-1957 service under conditions other than dishonorable qualifies a service member for a military wage credit for Social Security purposes.
13. Disabled veterans and Vietnam-era veterans only.

APPENDIX C

GENERAL COURT-MARTIAL

CASE FACTS

SFC John Smith has been found guilty, contrary to his pleas, of committing indecent acts upon and raping his now eleven-year-old daughter. You are on the panel that convicted him of the following offenses:

Charge I: Rape, a violation of article 120, U.C.M.J.
Charge II: Indecent Acts or Liberties with a Child, a violation of article 134, U.C.M.J.

The specific facts of United States v. Smith are as follows:

Since SFC Smith's step-daughter, Lola, was nine, SFC Smith has been fondling Lola's breasts and vaginal area. These illegal acts took place approximately twice a month during the past two years. During approximately 10 of these encounters, SFC Smith forced Lola to have sexual intercourse with him.

SFC Smith was careful to commit these acts only when Mrs. Smith was working at the Post Exchange (evenings and weekends). SFC Smith continuously threatened Lola that if she told anyone of her father's sexual abuse, he would deny everything. He also told her that the police would take her away from her mom and dad and make her live in a foster home with other bad children.

As a result of instruction in her fifth grade class about physical awareness, Lola finally confided in her best friend. Lola told her friend what her father had been doing to her for the past two years. Her friend told her parents, who reported it to the Criminal Investigation Division (CID). When interviewed, Lola broke down and told the CID agents everything her father had been doing to her.

Contrary to what SFC Smith had threatened Lola, when confronted by CID with Lola's allegations, he confessed to fondling her the past two years; he denied, however, raping her. He asked for CID's help for his "condition." CID immediately briefed SFC Smith's company commander. The company commander moved SFC Smith into the barracks and gave SFC Smith an order not to return to his quarters.

APPENDIX C

At his general court-martial, SFC Smith entered a plea of guilty to indecent acts with a child, but not guilty to the rapes.

Lola testified during the court-martial on the contested rape charge. It was extremely apparent that her father's misconduct the past two years seriously affected her emotionally. Several times during the court-martial, Lola broke down in tears and the court had to recess. Reliving the past two years was very traumatic.

SFC Smith testified on his own behalf during the trial on the rape charge. Consistent with his earlier statement to CID, he admitted the sexual assaults but vehemently denied the rapes. As panel members, you believed Lola and found him guilty of the rapes as charged.

Mrs. Smith testified as a sentencing witness. Mrs. Smith stated that Lola totally withdrew after she came forward with the allegations. At first, Lola could not speak to Mrs. Smith at all. Lola apparently felt that she had betrayed her mother. Mrs. Smith testified that Lola has been in therapy at the Army Family Counseling Center the past 8 weeks. According to Mrs. Smith, the counseling has had a very positive effect on Lola. Lola has finally started to come out of her "shell." Lola's counsellor informed Mrs. Smith that Lola would need therapy for at least another year. Mrs. Smith pleaded that her husband receive no confinement.

During the sentencing phase of trial, SFC Smith made an unsworn statement. He begged the court's forgiveness. He begged that he be returned to his wife and daughter without any confinement so that he could begin to rebuild his family.

SFC Smith produced numerous awards and decorations he received during his 16 years of Army service (to include 2 Meritorious Service Medals, 2 Army Commendation Medals, 2 Overseas Service Ribbons, and 5 Good Conduct Ribbons). SFC Smith's First Sergeant testified that SFC Smith always wears a meticulous uniform and performed his military duties well.

The maximum punishment the accused could receive for his crimes is confinement for life, a dishonorable discharge, total forfeitures of all pay and allowances, and reduction to E-1.

CHAPTER 8

POST-TRIAL RESPONSIBILITIES

Introduction

This chapter addresses the convening authority's powers and responsibilities after the court-martial has adjourned. Historically, the commander/convening authority performed in a quasi-judicial manner by reviewing a court-martial's findings and sentence for legal correctness, factual sufficiency, and overall appropriateness. The Military Justice Act of 1983 significantly modified the responsibilities of the convening authority. The commander retains all the same powers to deal with the case as before, but the staff judge advocate now conducts the legal review and makes recommendations to the convening authority.

A. Results of Trial

Article 60, UCMJ, and R.C.M. 1101(a), MCM, 1984, require that the convening authority or a designated delegate of the convening authority such as the SJA or chief of staff, be promptly notified of the results of each trial after the court-martial adjourns. As a practical matter, the SJA notifies the chief of staff and convening authority of all results of trial.

B. Post-trial Sessions

The convening authority may direct that the court-martial re-convene in either an Article 39(a), UCMJ, session (a portion of the trial conducted outside the presence of the court members) or a proceeding in revision. These procedures can correct apparent errors or omissions in the proceedings or inquire into allegations of misconduct during the trial by a court member or counsel.

REFERENCE: R.C.M. 1102.

C. The Record of Trial

After the record of trial has been prepared and authenticated by the military judge, it is forwarded to the convening authority for initial review and action. In general court-martial cases or special court-martial

cases in which a bad-conduct discharge was adjudged, the SJA must prepare a recommendation before the convening authority takes action.

REFERENCE: R.C.M. 1103 and 1106.

D. Convening Authority's Initial Action

R.C.M. 1107 governs the convening authority's action on a case. If the convening authority has other than an official interest in the case or has participated in the trial in a manner which creates or appears to create a lack of impartiality or objectivity, the convening authority may be disqualified from taking action. If this occurs, the record must be forwarded to another convening authority for action.

As noted in the introduction, the nature of the action to be taken on the findings and the sentence is a matter of command prerogative within the sole discretion of the convening authority. The convening authority is <u>not</u> required to review the case for legal or factual sufficiency. Thus, the commander's concerns in acting on a case will reflect considerations such as justice, clemency, discipline, mission requirements, or other appropriate considerations. Legal errors may, of course, be corrected by the convening authority but the commander is not required to analyze the record for legal errors.

There are certain limitations on the convening authority's action. The convening authority cannot take action before the time periods specified for submission of written matters by the accused expire or are waived by the accused. For general and special courts-martial, this waiting period is the later of 10 days after the accused is given an authenticated record of trial or, if applicable, 10 days after the accused is served with the recommendation of the SJA. For summary courts-martial, a seven-day period after sentencing is the only limit. The convening authority may extend these time limits upon request by an accused.

Another limit on the convening authority is that in taking action certain matters must be considered. Those matters are: the result of trial in the case; the SJA's recommendation, if one is required; and the matters submitted by the accused, if any.

The accused's right to submit matters to the convening authority after trial is guaranteed in Article

60, UCMJ, and R.C.M. 1105, MCM, 1984. The accused may submit anything deemed reasonably likely to influence the commander's action on the sentence or the findings of the court. As noted above, the convening authority must consider these matters before acting on the case.

The SJA's post-trial recommendation in general courts-martial and special courts-martial with an adjudged BCD must also be considered before action is taken. R.C.M. 1106 governs the contents of this recommendation. It is to be a concise written communication. It will relate the findings and sentence of the court, the accused's service record in summary fashion, the pretrial restraint, if any, the effects of any pretrial agreement, and the specific recommendation of the SJA for action on the sentence. If the defense submitted an allegation of legal error in their post-trial submissions, the SJA must respond to that allegation in the post-trial recommendation. The response may merely state agreement or disagreement. No explanation is required. The SJA may also include other appropriate matters in the recommendation. The post-trial recommendation must be served on the defense counsel and the accused, who then have 10 days to respond before the convening authority can take action. This response by the defense to the recommendation, together with the accused's R.C.M. 1105 submissions, comprise the defense matters which must be considered by the convening authority before action is taken.

In addition to what must be considered, the commander may consider the record of trial, the accused's personnel records, and any other appropriate matters. If such matters are outside the record and are adverse to the accused, then the defense must be given notice and an opportunity to respond.

In taking action, the convening authority need not act on the findings. The convening authority may however, set aside the findings in whole or in part, reduce the findings to lesser included offenses, or order a rehearing as to some or all of the guilty findings.

In acting on the sentence, the convening authority may approve or disapprove the sentence in whole or in part, mitigate it, or change it, so long as the severity is not increased. The commander may act on the sentence for any reason or for no reason; but, the action taken must be explicitly stated.

E. Promulgating the Action

After the convening authority has taken action on a case, an order promulgating the results of trial and the commander's action must be published. Under Article 71, UCMJ, the convening authority may order executed in the initial action any part of the adjudged and approved sentence except a DD, BCD, dismissal, or death. These latter punishments go into effect only after appellate review is completed and in the case of death the President orders it executed. The convening authority does not designate a place of confinement in the action or order. Military Police regulations establish the place of confinement depending on the length of sentence. A sample action and court-martial order are included at pages 8-5 and 8-6.

F. Conclusion

The Military Justice Act of 1983 and the Manual for Courts-Martial, United States, 1984, significantly reduced the commander's post-trial legal review functions. The burden of post-trial legal review shifted to the trial defense counsel and the military appellate courts. The convening authority, however, may still be required to consider legal issues at the time of initial action based upon defense submissions and the SJA's response. As a result, the convening authority must maintain an active interest in the development and administration of military justice. Additionally, the commander must never appear to be unfair or inconsiderate in the use of judicial authority. The proper use of judicial authority by the convening authority ensures high morale and discipline, and guarantees the commander's effective exercise of command responsibilities.

ACTION

DEPARTMENT OF ARMY
HEADQUARTERS, 2D BRIGADE, 26TH CAVALRY DIVISION (AM)
Fort Arlington, Virginia

20 December 199X

In the case of Private First Class (E-3) Thomas L. Amherst, 429-86-4723, Company B, 1st Battalion, 16th Infantry, 26th Cavalry Division (AM), Fort Arlington, Virginia 22901, only so much of the sentence as provides for confinement for three months, forfeiture of $100.00 pay per month for three months, and reduction to the lowest enlisted grade is approved and will be executed.

JAMES E. WALKER
COL, IN
Commanding

DEPARTMENT OF THE ARMY
HEADQUARTERS, 2D BRIGADE, 26TH CAVALRY DIVISION (AM)
Fort Arlington, VA 22901

SPECIAL COURT-MARTIAL ORDER NUMBER 8 — 20 December 199X

Private First Class (E-3) Thomas L. Amherst, 429-86-4723, U.S. Army, Company B, 1st Battalion, 16th Infantry, Arlington, VA 22901, was arraigned at Fort Arlington, Virginia, on the following offenses at a special court-martial convened by Commander, 2d Brigade, 26th Cavalry Division.

Charge I. Article 121. Plea: Guilty. Finding: Guilty.

Specification: Larceny of property of a value of $180.00 on 14 November 199X. Plea: Not Guilty. Finding: Guilty except the word "steal", substituting "wrongfully appropriate".

Charge II. Article 95. Plea: Not Guilty. Finding: Not Guilty.

Specification: Resisting apprehension on 15 November 199X.
Plea: Not Guilty. Finding: Not Guilty.

SENTENCE

Sentence adjudged on 5 December 199X: Confinement for six months, forfeiture of $100.00 pay per month for six months, and reduction to the lowest enlisted grade.

ACTION

Only so much of the sentence as provides for confinement for three months, forfeiture of $100.00 pay per month for three months, and reduction to the lowest enlisted grade is approved and will be executed.

BY ORDER OF COLONEL WALKER:

CHARLES N. EAST
CW3, USA
Legal Administrator

DISTRIBUTION:
(Refer to para. 12-7, AR 27-10)

CHAPTER 9

The Amherst Problem -- Pretrial Disposition

1. **General Facts:**

You are the Commander of the 2d Brigade of the 26th Cavalry Division. A 21-year-old rifleman of B Company, 1st Bn, 16th Inf, PFC Thomas Amherst, was apprehended 72 hours ago for the larceny of $180 in U.S. currency from SPC Alvin Northfield, a fellow squad member. The larceny occurred four days ago in the company barracks.

At the time of the apprehension, PFC Amherst is alleged to have resisted the military police who had been called by the unit commander, Captain Leader, to the company area. When Amherst arrived in Captain Leader's office, he was noticeably apprehensive about the presence of the military police but was verbally restrained by his commander. The unit commander then orally advised him of his rights and informed Amherst that he was to accompany the military police to the PMO for questioning about the suspected larceny. PFC Amherst then refused and ran for the door. He was pursued, caught, and transported to the PMO. During a subsequent interview with MP Captain Hoover and CID, PFC Amherst was readvised of his Article 31 rights. He waived his rights and voluntarily signed a written confession to the taking of the money.

Continuing the investigation, the military police obtained written statements from various witnesses involved, including the victim, SPC Northfield, and the two MPs who pursued and captured the suspect.

Although there were no eyewitnesses, PFC Amherst admitted taking Northfield's cash, denied any intent to steal, and attributed his hasty departure from Captain Leader's office to unclear thinking, coupled with an acknowledged fear of the racial attitudes of SPC Klein, one of the military police sent to apprehend him.

The larceny victim, SPC Northfield, described the circumstances of his securing his cash in a footlocker prior to the loss and his awareness of Amherst's presence in the barracks at the time he left for the field. Both Northfield and the unit first sergeant (to whom the loss was first reported) related their knowledge of Amherst's temporary deferment from the unit's field problem, which had required Northfield to be sent out of the barracks at the time of the loss.

The two military policemen involved in the apprehension provided statements of their observations of Amherst following his entry into custody.

2. Personal Background:

PFC Thomas Amherst's formal education consists of completion of high school. He lived most of his childhood with his divorced mother, who relies on him today for most of her support. Amherst scored 90 on his GT entry test and Captain Leader states that his conduct and efficiency ratings have been excellent. Similar ratings were received from previous commanders during Amherst's 18 months service on his current three-year enlistment. He has no combat experience but has completed airborne training and qualified as an expert rifleman. He has no prior military or civilian criminal record. His record reflects no evidence of mental instability.

The following pages include copies of the actual witness statements, charge sheet (DD Form 458), and allied papers. More specific details are found there.

3. Requirement:

a. Examine the court-martial packet for administrative accuracy.

b. Indicate your evaluation of the available evidence and the validity of each of the specifications.

c. Discuss the relevant considerations and your disposition of Amherst's request for discharge for the good of the service UP Chapter 10, AR 635-200 (page 9-23).

d. Discuss your disposition of the pending charges in this case and the reasons why you have elected that disposition.

4. Continuation:

Assume that you have referred the case to trial by special court-martial on both charges and specifications. The accused has submitted the inclosed "Offer to Plead Guilty" (page 9-27).

5. **Requirement**:

Indicate your disposition of the offer of a negotiated plea and be prepared to justify your disposition.

6. **Additional Background**:

Dates are indicated by 199X, 199X-1, etc. 199X is the current year. 199X-1 is the current year minus 1 and so on. For purposes of this problem, you have been concerned of late about your Brigade's "indiscipline index." While Amherst's battalion, 1/16th Inf. has no major problem, another of your battalions has experienced a rash of barracks larcenies.

DEPARTMENT OF THE ARMY
COMPANY B, 1ST BATTALION, 16TH INFANTRY
FORT ARLINGTON, VIRGINIA 22901

AFZW-Z 17 November 199X

MEMORANDUM FOR Commanding Officer, 1st Battalion, 16th Infantry, Fort Arlington, Virginia 22901

SUBJECT: Court-Martial Charges in the Case of Private First Class (E3) Thomas L. Amherst, 429-86-4723, Company B, 1/16 Infantry

1. In compliance with R.C.M. 401(c)(2)(A), there are forwarded herewith (Encl 1) court-martial charges for disposition. The accused has not been offered nonjudicial punishment for these offenses.

2. Statements of witnesses upon which the charges are based are enclosed (Encl 2).

3. All material witnesses are expected to be available at the time of trial.

4. There is evidence of no previous convictions and no records of prior nonjudicial punishment of the accused. A duly authenticated extract copy of accused's Record of Court-Martial Convictions is enclosed (Encl 3).

5. The character of the accused's military service before the offenses charged has been excellent.

6. I recommend trial by general court-martial.

3 Encls
1. Charge Sheet (5 cys)
2. Witness Statements (5 cys)
3. Record of Previous Convictions (5 cys)

RONALD C. LEADER
Captain, IN
Commanding

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. GRADE OR RANK	4. PAY GRADE
AMHERST, THOMAS L.	429-76-4723	PFC	E-3

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
Company B, 1st Bn, 16th INF, 26th Cav Div (AM)	7 May 199X-2	3 years

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$965.40	N/A	$965.40		

II. CHARGES AND SPECIFICATIONS

10. CHARGE: VIOLATION OF THE UCMJ, ARTICLE

SPECIFICATION: In that Private First Class (E-3) Thomas L. Amherst, US Army, Company B, 1st Battalion, 16th Infantry, 26th Cavalry Division (AM), did at Fort Arlington, Virginia, on or about 14 November 199X, hold $180.00 in U.S. currency, the property of Specialist Alvin R. Northfield, U.S. Army.

CHARGE II: Violation of the Uniform Code of Military Justice, Article 95.

Specification: In that Private First Class (E-3) Thomas L. Amherst, US Army, Company B, 1st Battalion, 16th Infantry, 26th Cavalry Division (AM) did, at Fort Arlington, Virginia, on or about 15 November 199X, resist being apprehended by Specialist Karl W. Klein and Specialist Thomas J. Caster, 55th Military Police Company, Fort Arlington, Virginia, military policemen authorized to apprehend the accused.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
Leader, Ronald C.	CPT	Co B 1/16 Inf

d. SIGNATURE OF ACCUSER	e. DATE
	17 November 199X

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 17 day of November, 19 9X, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief

Wallace L. Bloor
Typed Name of Officer

1st Bn, 16th Inf
Organization of Officer

1LT
Grade

Acting Assistant Adjutant
Official Capacity to Administer Oath
(See R.C.M. 307(b)—must be commissioned officer)

Signature

9-5

DD FORM 458 EDITION OF OCT 69 IS OBSOLETE.

12.

On 17 November , 19 9X , the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me *(See R.C.M. 308 (a)). (See R.C.M. 308 if notification cannot be made.)*

Ronald C. Leader
Typed Name of Immediate Commander

Co B, 1/16 Inf
Organization of Immediate Commander

CPT
Grade

Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.

The sworn charges were received at 1100 hours, 17 November 19 9X at 1st Battalion, 16th Infantry
Designation of Command or

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE[1] _____

Wallace L. Bloor
Typed Name of Officer

Acting Assistant Adjutant
Official Capacity of Officer Signing

1LT
Grade

Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE

Referred for trial to the _____ court-martial convened by _____

_____ , _____ 19 ____, subject to the following instructions:[2] _____

_____ By _____ of _____
Command or Order

_____
Typed Name of Officer

_____
Official Capacity of Officer Signing

_____
Grade

_____
Signature

15.

On _____ , 19 _____ , I (caused to be) served a copy hereof on (each of) the above named accused.

_____
Typed Name of Trial Counsel

_____
Grade or Rank of Trial Counsel

_____
Signature

FOOTNOTES: 1 — When an appropriate commander signs personally, inapplicable words are stricken.
2 — See R.C.M. 601(e) concerning instructions. If none, so state.

☆U.S. G.P.O. 1984-421-545/17048

RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE

For use of this form, see AR 190-30; the proponent agency is DCSPER.

DATA REQUIRED BY THE PRIVACY ACT

AUTHORITY: Title 10, United States Code, Section 3012(g).
PRINCIPAL PURPOSE: To provide commanders and law enforcement officials with means by which information may be accurately identified.
ROUTINE USES: Your Social Security Number is used as an additional/alternate means of identification to facilitate filing and retrieval.
DISCLOSURE: Disclosure of your Social Security Number is voluntary.

LOCATION	DATE	TIME	FILE NO.
Fort Arlington, Virginia 22901	15 Nov 9X	1400	

NAME (Last, First, MI)	ORGANIZATION OR ADDRESS
Amherst, Thomas Lincoln	

SOCIAL SECURITY NO.	GRADE/STATUS
429-86-4723	PFC E-3

SECTION A - RIGHTS WAIVER/NON-WAIVER CERTIFICATE

RIGHTS

The investigator whose name appears below told me that he/she is with the United States Army 8th Criminal Investigation Detachment, 12th MP Group (CI) and wanted to question me about the following offense(s) of Larceny of $180.00 from SPC Northfield and resisting apprehension by Military Police which I am suspected/accused.

Before he/she asked me any questions about the offense(s), however, he/she made it clear to me that I have the following rights:

1. I do not have to answer any questions or say anything.
2. Anything I say or do can be used as evidence against me in a criminal trial.
3. *(For personnel subject to the UCMJ)* I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both.

- or -

(For civilians not subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. However, I understand that I must make my own arrangements to obtain a lawyer and this will be at no expense to the Government. I further understand that if I cannot afford a lawyer and want one, arrangements will be made to obtain a lawyer for me in accordance with the law.

4. If I am now willing to discuss the offense(s) under investigation, with or without a lawyer present, I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waiver below.

COMMENT *(Continue on reverse side)*

WAIVER

I understand my rights as stated above. I am now willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me.

WITNESSES *(If available)*	SIGNATURE OF INTERVIEWEE
1. NAME *(Type or Print)* Richard Templin	Thomas Lincoln Amherst
ORGANIZATION OR ADDRESS AND PHONE SSG Richard Templin, 55th MP Co., Ft Arlington, VA	SIGNATURE OF INVESTIGATOR Miranda Tempia
2. NAME *(Type or Print)*	TYPED NAME OF INVESTIGATOR CWO Miranda Tempia
ORGANIZATION OR ADDRESS AND PHONE	ORGANIZATION OF INVESTIGATOR 8th CID, 12th MP Group (CI), Fort Arlington, VA 22901

NON-WAIVER

I do not want to give up my rights:

___ I want a lawyer.

___ I do not want to be questioned or say anything.

SIGNATURE OF INTERVIEWEE

ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT (DA FORM 2823) SUBSEQUENTLY EXECUTED BY THE SUBJECT/SUSPECT/ACCUSED.

SECTION B - RIGHTS WARNING PROCEDURE

THE WARNING

1. WARNING - Inform the suspect/accused of:

   a. Your official position.

   b. Nature of offense(s).

   c. The fact that he/she is a suspect/accused.

2. RIGHTS - Advise the suspect/accused of his/her rights as follows:

   "Before I ask you any questions, you must understand your rights."

   a. "You do not have to answer my questions or say anything."

   b. "Anything you say or do can be used as evidence against you in a criminal trial."

   c. *(For personnel subject to the UCMJ)* "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both."

   - *or* -

   (For civilians not subject to the UCMJ) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. However, you must make your own arrangements to obtain a lawyer and this will be at no expense to the Government. If you cannot afford a lawyer and want one, arrangements will be made to obtain a lawyer for you in accordance with the law."

   d. "If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign a waiver certificate."

Make certain the suspect/accused fully understands his/her rights.

THE WAIVER

"Do you understand your rights?"
(If the suspect/accused says "no," determine what is not understood, and if necessary repeat the appropriate rights advisement. If the suspect/accused says "yes," ask the following question.)

"Do you want a lawyer at this time?"
(If the suspect/accused says "yes," stop the questioning until he/she has a lawyer. If the suspect/accused says "no," ask him/her the following question.)

"At this time, are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?"
(If the suspect/accused says "no," stop the interview and have him/her read and sign the non-waiver section of the waiver certificate on the other side of this form. If the suspect says "yes," have him/her read and sign the waiver section of the waiver certificate on the other side of this form.)

SPECIAL INSTRUCTIONS

WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE: If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation, and refuses to sign the waiver certificate.

IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY: In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.

PRIOR INCRIMINATING STATEMENTS:

(1) If the suspect/accused has made spontaneous incriminating statements before being properly advised of his/her rights he/she should be told that such statements do not obligate him/her to answer further questions.

(2) If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. The office of the serving Staff Judge Advocate should be contacted for assistance in drafting the proper rights advisal.

NOTE: If (1) or (2) apply, the fact that the suspect/accused was advised accordingly should be noted in the comment section on the waiver certificate and initialed by the suspect/accused.

COMMENT *(Continued)*

Reverse of DA Form 3881

SWORN STATEMENT

For use of this form, see AR 190-45; the proponent agency is Office of The Deputy Chief of Staff for Personnel.

LOCATION	DATE	TIME	FILE NUMBER
Arlington, Virginia 22901	15 Nov 9[illegible]	1400	
LAST NAME, FIRST NAME, MIDDLE NAME	**SOCIAL SECURITY NUMBER**		**GRADE/STATUS**
AMHERST, Thomas Lincoln	429-86-4723		PFC E3
ORGANIZATION OR ADDRESS			
Company B, 1st Battalion, 16th Inf, 26th Cav Div (AM), Fort Arlington, Virginia			

I, Thomas Lincoln Amherst, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OAT

On 14 Nov 199[illegible], at about 1245 hours, I saw SPC Alvin Northfield in our squad bay counting some money. He put it in his footlocker. It was in a Blitz cloth box. He locked his footlocker and put the combination card in his field jacket in the wall locker. After the squad went on the problem in the afternoon I was reading a letter from my mother where she said she was sick and needed some more money for a doctor and medicine. I supported her. She doesn't have any more income except what I give her. I borrowed the money from Northfield's footlocker and went to the PX, got a money order and mailed the money to my mother. There was $180 in US currency. I wasn't going to keep the money but I didn't ask Bro Northfield if I could borrow it because he was in the field. I was going to pay him back next payday.

I've been on light duty the last three days because of a reaction to some medicine the doctor gave me. Because of the medicine and my mother's problems, I guess I haven't been thinking very clearly. I didn't mean to run away from the MP's but I was scared. I'd heard about a couple of brothers getting beat up by the MP's when they were taken to the MP station. The big German guy, I think his name is Kline, has a reputation for being rough on blacks. So when he told me to go and started to grab me I got scared and ran. "Let's go boy"

TLA

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT	PAGE 1 OF 2 PAGES
	TLA	

ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF ___ TAKEN AT ___ DATED ___ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE ___ OF ___ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

DA FORM 2823 SUPERSEDES DA FORM 2823, 1 JAN 72, WHICH WILL BE USED.

STATEMENT (Continued)

TLA

AFFIDAVIT

I, Thomas Lincoln Amherst, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 2. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

Thomas Lincoln Amherst
(Signature of Person Making Statement)

WITNESSES

Charles P Rose
Charles P. Rose
55th MP Co.
ORGANIZATION OR ADDRESS

ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 15 day of November, 19 9X at Fort Arlington, Virginia

Frederick K. Hoover
(Signature of Person Administering Oath)

Frederick K. Hoover, CPT, MPC
(Typed Name of Person Administering Oath)

Article 136, U. C. M. J.
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT
TLA

SWORN STATEMENT

For use of this form, see AR 190-45; the proponent agency is Office of The Deputy Chief of Staff for Personnel.

LOCATION	DATE	TIME	FILE NUMBER
Fort Arlington	15 Nov 9X	0930	
LAST NAME, FIRST NAME, MIDDLE NAME	**SOCIAL SECURITY NUMBER**		**GRADE/STATUS**
NORTHFIELD, Alvin Roosevelt	204-71-3491		SPC
ORGANIZATION OR ADDRESS			
Company B, 1st Bn, 16th Inf, 26th Cav Div (AM)			

I, Alvin R. Northfield, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

On 14 November 199X, at about 1800, I returned to my squad bay in Bravo barracks after a 4 hour ambush problem. I unlocked my footlocker to get my money I had saved to buy a record player. I had $180 hidden in a Blitz cloth box, eight $20 bills and two $10 bills. I know it was exactly $180 because I had counted it just after noon chow before ~~we~~ we went to the field for the ambush problem. When I opened the box the money was gone. I checked all over but it wasn't anywhere around so I told Top. Only Bro Amherst was around when I counted the ~~the~~ money. My lock is combination and I haven't told anybody the combination. I keep the combination in my field jacket hanging in my wall locker. The lock to my wall locker is broke. Bro Amherst wasn't with the squad at the ambush problem because he has a three day light duty ~~pass~~. We get along ok though he's only been in our squad for a couple of months.

ARN

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT	PAGE 1 OF 2 PAGES
	ARN	

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DA FORM 2823 SUPERSEDES DA FORM 2823, 1 JAN 66, WHICH WILL BE USED.

STATEMENT (Continued)

ARN

AFFIDAVIT

I, Alvin R. Northfield, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 2. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

Alvin R Northfield
(Signature of Person Making Statement)

WITNESSES:

Charles P Rose
CHARLES P. ROSE
ORGANIZATION OR ADDRESS

ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 15 day of November, 19 9X at

Frederick K. Hoover
(Signature of Person Administering Oath)

Frederick K. Hoover, CPT, MPC
(Typed Name of Person Administering Oath)

Commanding Officer, 55th MP Co.
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT: ARN

PAGE 2 OF 2 PAGES

[illegible]

SWORN STATEMENT

For use of this form, see AR 190-45; the proponent agency is Office of The Deputy Chief of Staff for Personnel.

LOCATION	DATE	TIME	FILE NUMBER
Fort Arlington, Virginia	15 Nov 9[illegible]	1030 hrs	
LAST NAME, FIRST NAME, MIDDLE NAME	**SOCIAL SECURITY NUMBER**		**GRADE/STATUS**
CASTER, Thomas Joseph	402-29-4727		SPC
ORGANIZATION OR ADDRESS			
55th MP Co, Fort Arlington, Virginia			

I, Thomas J. Caster, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

I am a military policeman working patrol with my partner, SPC Carl W. Klein. On the morning of 15 Nov 9[illegible] we were instructed to report to the CO, Co B, 1/16 Inf, Fort Arlington, to pick up a subject, PFC Thomas Amherst, and bring him in for questioning regarding a larceny.

When we reached the CO's office, the subject came in and CPT Leader advised him of his rights, asked him if he had anything to say, and instructed him to go with us to the MP station for questioning. Subject stood silent and my partner said "Let's go." Subject shouted "No" and ran out the door. We gave pursuit and overtook the fleeing subject in the orderly room, using necessary force to subdue him. We then took him to the PM detention facility. Neither SPC Klein nor I was injured in the fight. The subject was bruised on the back of the head and the wrists.

At no time did SPC Klein or I make any reference to the race of the subject or say any threatening words or use any threatening gestures.

TJC

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT	PAGE 1 OF 2 PAGES
	TJC	

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DA FORM 2823 SUPERSEDES DA FORM 2823, 1 JAN 66, WHICH WILL BE USED.

STATEMENT (Continued)

TJC

AFFIDAVIT

I, Thomas J. Carter, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

Thomas J. Carter
(Signature of Person Making Statement)

WITNESSES

Charles P Rose

CHARLES P. ROSE
ORGANIZATION OR ADDRESS
55th MP Co.

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 15 day of November, 19 9X at Fort Arlington, Virginia

Frederick K. Hoover
(Signature of Person Administering Oath)

Frederick K. Hoover, CPT, MPC
(Typed Name of Person Administering Oath)
Commanding Officer, 55th MP Co.
(Authority To Administer Oaths)

ORGANIZATION OR ADDRESS

TJC

INITIALS OF PERSON MAKING STATEMENT

PAGE 2 OF 2 PAGES

SWORN STATEMENT

For use of this form, see AR 190-45; the proponent agency is Office of The Deputy Chief of Staff for Personnel.

LOCATION	DATE	TIME	FILE NUMBER
Fort Arlington, Virginia	15 Nov 9X	1000 hrs	
LAST NAME, FIRST NAME, MIDDLE NAME	**SOCIAL SECURITY NUMBER**		**GRADE/STATUS**
KLEIN, Carl Weldon	291-61-4045		Specialist
ORGANIZATION OR ADDRESS			
55th MP Co, Fort Arlington, Virginia			

I, Carl W. KLEIN, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

I am a military policeman working patrol with my partner, SPC Thomas Caster. On the morning of 15 Nov 9X, we were instructed to report to the CO, Co B, 1/16 Inf, Fort Arlington, to pick up a subject, PFC Thomas Amherst, and bring him in for questioning regarding a larceny.

When we arrived at Co B, subject came in and the CO, CPT Leader, advised him of his rights and instructed him to go with us to the MP station for questioning. When we were dismissed, I told subject "Let's go" and he shouted "No" and ran. My partner and I gave pursuit on foot, overtook the fleeing subject in the orderly room and used necessary force to apprehend him. He was then transported to the PM detention facility. Neither my partner nor I were injured in the altercation. The subject received minor lacerations.

At no time did my partner or I make any references to the race of the subject or exhibit any threatening words, mannerisms or gestures.

CWK

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT	PAGE 1 OF 2 PAGES
	CWK	

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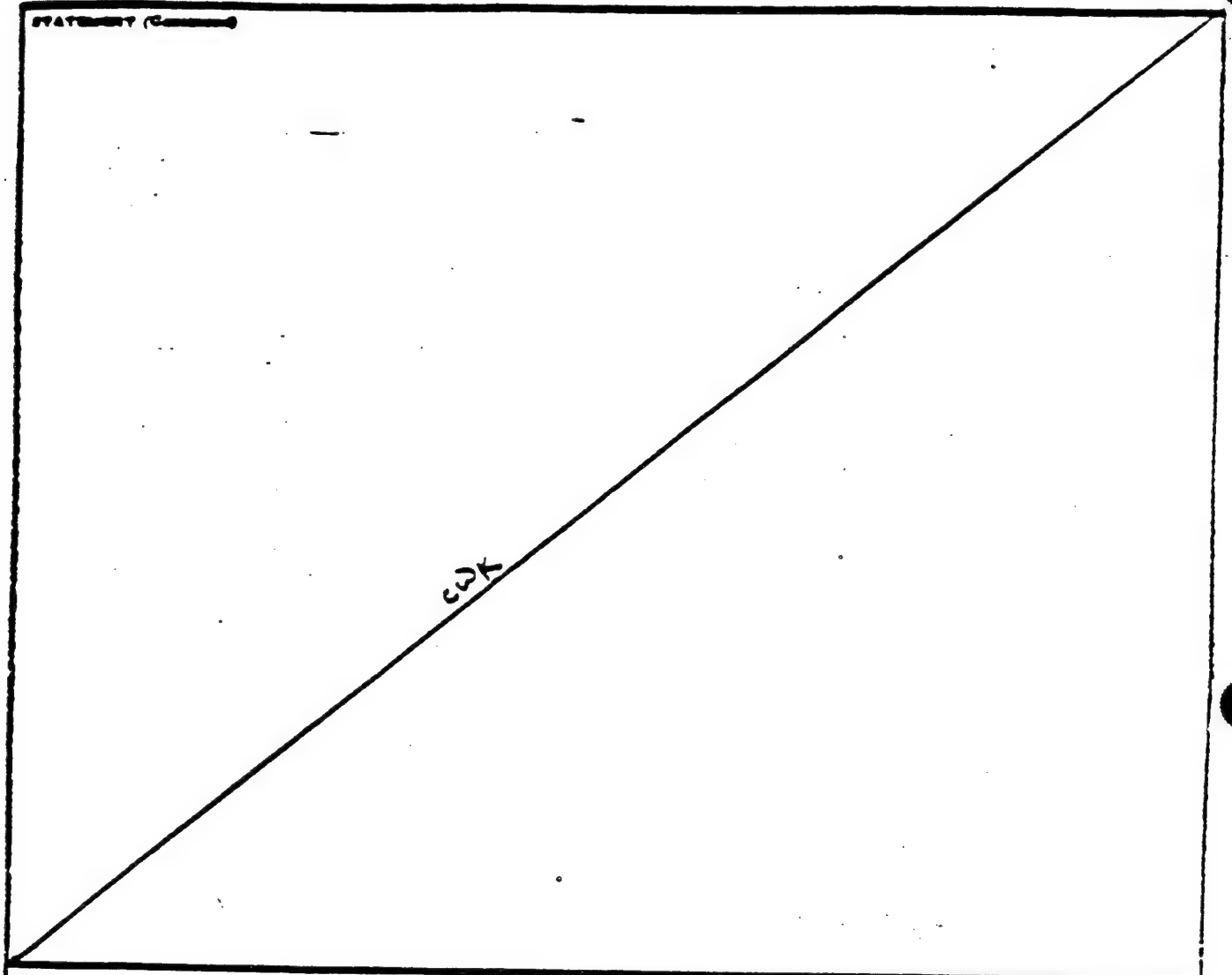
DA FORM 2823 SUPERSEDES DA FORM 2823, 1 JAN 65, WHICH WILL BE USED.

STATEMENT (Continued)



AFFIDAVIT

I, Carl W. Klein, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE ____. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

Carl W. Klein
(Signature of Person Making Statement)

WITNESSES

Charles P Rose

CHARLES P. ROSE
ORGANIZATION OR ADDRESS
55th MP Co.

ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 15 day of November, 19 9X at Fort Arlington, Virginia

Frederick K. Hoover
(Signature of Person Administering Oath)

Frederick K. Hoover, CPT, MPC
(Typed Name of Person Administering Oath)
Commanding Officer, 55th MP Co
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT CWK

SWORN STATEMENT

For use of this form, see AR 190-45; the proponent agency is Office of The Deputy Chief of Staff for Personnel.

LOCATION	DATE	TIME	FILE NUMBER
Fort Arlington, Virginia	15 Nov 9X	0900 hrs	
LAST NAME, FIRST NAME, MIDDLE NAME	**SOCIAL SECURITY NUMBER**		**GRADE/STATUS**
RANDOLPH, Bertrand Lee	405-94-7723		SFC (E-7)
ORGANIZATION OR ADDRESS			
Bravo Company, 1st Bn, 16th Inf, 26th Cav Div (AM)			

I, Bertrand L. Randolph, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OAT

I am acting 1st Sergeant of Bravo Company, 1/16 Inf, Fort Arlington, Va. On 14 Nov 9X, at about 1830 hours, Corporal Alvin Northfield came to see me and said somebody had stolen $180 from his footlocker. The other three individuals who occupy the squad bay with Northfield are PFC Armando Gomez, PFC Dillon Banfield and PFC Thomas Amherst. I immediately interviewed Gomez and Banfield but they couldn't provide any information because they had been on the ambush problem with Bravo company all afternoon. Amherst was not in the company area so I didn't get to interview him. I know Amherst wasn't on the ambush problem because he has been put on light duty because of a reaction to some medicine he took a couple of days ago. The company barracks and individual squad bays were not locked during the afternoon but I was in the area during this entire time and did not observe any strangers. I did see PFC Amherst leave the billets at about 1400 hours and heard him tell the CQ that he was going to the doctor and the PX.

At about 1930 I reported the theft to the military police. PFC Amherst has been in the unit about two months and seems to get along well with everybody else. I am not aware of any financial problems he might have although I do know that he supports his mother. B.L.R.

B.L.R.

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT	PAGE 1 OF 2 PAGES
	B.L.R.	

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DA FORM 2823 PREVIOUS EDITIONS OF THIS FORM, 1 JAN 72, WHICH WILL BE USED.

STATEMENT (Continued)

B.L.R.

AFFIDAVIT

I, Bertrand L. Randolph HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE ____. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

Bertrand L. Randolph
(Signature of Person Making Statement)

WITNESSES:

Charles P. Rose

CHARLES P. ROSE
ORGANIZATION OR ADDRESS
55th MP Co.

ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 15 day of November, 19[illegible] at Fort Arlington, Virginia

Frederick K. Hoover
(Signature of Person Administering Oath)

Frederick K. Hoover, CPT, MPC
(Typed Name of Person Administering Oath)

Commanding Officer, 55th MP Co.
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT B.L.R.

PAGE 2 OF 2 PAGES

SWORN STATEMENT

For use of this form, see AR 190-45; the proponent agency is Office of The Deputy Chief of Staff for Personnel.

LOCATION	DATE	TIME	FILE NUMBER
Fort Arlington, Virginia	15 Nov 9X	1130 hrs	
LAST NAME, FIRST NAME, MIDDLE NAME	**SOCIAL SECURITY NUMBER**		**GRADE/STATUS**
LEADER, Ronald Charles	505-27-2722		CPT IN
ORGANIZATION OR ADDRESS			
Company B, 1st Bn, 16th Inf, 26th Cav Div (AM)			

I, Ronald C. Leader, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

I am the commanding officer of Bravo Company, 1/16 Inf, at Fort Arlington, Virginia. On 14 Nov 9X, my 1SGT, SFC Randolph, advised me that a larceny had occurred in the first squad. After SFC Randolph briefed me, I talked with the victim, SPC Northfield, and his roommates, PFC Gomez, PFC Banfield, and PFC Amherst. Gomez and Banfield denied any knowledge of the incident. After I advised Amherst of his rights, he said that he had just returned from the doctor, who had given him some medication, and that he couldn't think straight. He requested permission to talk about it in the morning. I agreed, believing that any information I might receive would not be proper since Amherst was clearly woozy.

I called the MP's and made arrangements for them to pick Amherst up for questioning at 0800 the next morning. When the MP's arrived the next morning, I had Amherst brought to my office. When he saw the MP's he started to leave. I ordered him to halt and to stand at ease. He complied and I again advised him of his rights and told him that the MP's were going to take him to the PMO for questioning. I asked him if he wanted to say anything before he left. He just stood silent. I dismissed the men and one of the MP's, SPC Klein, told Amherst "Let's go." Amherst shouted "No" and ran for the door. The MP's gave chase, caught him in the orderly room, subdued him, and transported him to the detention facility at the office of the PM.

PFC Amherst has been in my unit for about two months and, except for his medical problems which came up recently, has gotten along well. He has not discussed any financial problems with me. RCL

RCL

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT	PAGE 1 OF 2 PAGES
	RCL	

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STATEMENT (Continued)

RCL

AFFIDAVIT

I, Ronald C. Leader, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE ____. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE OR UNLAWFUL INDUCEMENT.

Ronald C. Leader
(Signature of Person Making Statement)

WITNESSES

Charles P Rose

CHARLES P. ROSE

ORGANIZATION OR ADDRESS

55th MP Co.

ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 15 day of November, 19 9X

at Fort Arlington, Virginia

Frederick K. Hoover
(Signature of Person Administering Oath)

Frederick K. Hoover, CPT, MPC
(Typed Name of Person Administering Oath)

Commanding Officer, 55th MP Co.
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

RCL

EXTRACT OF MILITARY RECORDS OF PREVIOUS CONVICTIONS

IDENTIFICATION

LAST NAME - FIRST NAME - MIDDLE INITIAL	SERVICE NO./SSAN	GRADE	ORGANIZATION
Amherst, Thomas L.	429-86-4723	PFC (E3)	Company B, 1/16 Infantry

RECORD OF PREVIOUS CONVICTIONS BY COURTS-MARTIAL 1/

TYPE OF COURT-MARTIAL	CM ORDER OR SCM NO.	HEADQUARTERS	ARTICLE(S)

SYNOPSIS OF SPECIFICATION(S) INCLUDING DATE OF OFFENSE

SENTENCE AS FINALLY APPROVED

DATE SENTENCE ADJUDGED	DATE SENTENCE FINALLY APPROVED	I CERTIFY THE FOREGOING IS CORRECT 2/
		(Signed) ______ (Type or print name and grade of person signing original entry in military record) ______ (Type or print name and grade of person signing original entry in military record)

TYPE OF COURT-MARTIAL	CM ORDER OR SCM NO.	HEADQUARTERS	ARTICLE(S)

SYNOPSIS OF SPECIFICATION(S) INCLUDING DATE OF OFFENSE

SENTENCE AS FINALLY APPROVED

DATE SENTENCE ADJUDGED	DATE SENTENCE FINALLY APPROVED	I CERTIFY THE FOREGOING IS CORRECT 2/
		(Signed) ______ (Type or print name and grade of person signing original entry in military record) ______ (Type or print name and grade of person signing original entry in military record)

TYPE OF COURT-MARTIAL	CM ORDER OR SCM NO.	HEADQUARTERS	ARTICLE(S)

SYNOPSIS OF SPECIFICATION(S) INCLUDING DATE OF OFFENSE

SENTENCE AS FINALLY APPROVED

DATE SENTENCE ADJUDGED	DATE SENTENCE FINALLY APPROVED	I CERTIFY THE FOREGOING IS CORRECT 2/
		(Signed) ______ (Type or print name and grade of person signing original entry in military record) ______ (Type or print name and grade of person signing original entry in military record)

ATTESTING CERTIFICATE

ORGANIZATION OF CUSTODIAN	PLACE OF ORGANIZATION	DATE
1st Battalion, 16th Infantry	Fort Arlington, Virginia	17 Nov 9X

I CERTIFY THAT I AM THE OFFICIAL CUSTODIAN OF THE MILITARY PERSONNEL RECORDS PERTAINING TO PREVIOUS CONVICTIONS BY COURT-MARTIAL OF THE ABOVE-NAMED PERSON, AND THAT THE FOREGOING IS A TRUE COPY OF THE ENTRIES CONTAINED THEREIN. 1/

TYPED NAME, GRADE, AND OFFICIAL CAPACITY OF CUSTODIAN	SIGNATURE
HAROLD P. WHITE, CWO, W-2, Personnel Officer	Harold P White

1/ Only admissible previous convictions will be listed. To determine admissibility, see rules on the reverse hereof. For Army personnel, the extract will be prepared from the Service Record or DA Form 2A. For Air Force Personnel, the extract will be prepared from AF Form 1225. For Navy personnel, the extract will be prepared from NAVPERS Form 601-6. For Marine Corps personnel, the extract will be prepared from NAVMC Form 118(13)-PD.

2/ If the service record certification block being extracted fails to contain the required: (1) Signature of the personnel records custodian, request that officer to take immediate corrective action; (2) grade and organization of the custodian of the conviction record, enter remarks such as "(Name)", "(Grade not shown)", "(Organization not shown)", as appropriate, on the second line of this block of the extract.

DD FORM 1 MAR 70 493 — REPLACES DD FORM 493, 1 MAY 52, WHICH IS OBSOLETE.

RULES FOR DETERMINING ADMISSIBILITY OF PREVIOUS CONVICTIONS

(See MCM, 1969 (Rev.), Paragraphs 44d and 75a(2))

Previous convictions must relate to offenses committed during the six years next preceding the commission of any offense of which the accused stands convicted. In computing the six-year period, periods of unauthorized absence as shown by the findings in the case or by the evidence of previous convictions should be excluded.

Evidence is only admissible on evidence of a previous conviction when the accused has been tried for an offense within the meaning of Article 44(b), UCMJ. Therefore, no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall, as to that charge or specification, be admissible as a previous conviction until the finding of guilty has become final after review of the case has been fully completed. However, a pending request to the Judge Advocate General to vacate or modify the findings and sentence of a court-martial on grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused is not a part of the review within the meaning of Article 76, UCMJ and it does not affect the admissibility of that court-martial as a previous conviction. A vacation of a suspended sentence does not itself qualify as a previous conviction and will not be entered on this form.

INTRODUCING EVIDENCE OF PREVIOUS CONVICTIONS

NOTE: To be considered by a court-martial, previous convictions must be ADMITTED in evidence. Ordinarily, they are proved by introducing in evidence a duly authenticated certified copy of accused's military personnel record (DD Form 493). They may also be proved by the record of previous convictions or by the order promulgating the results of trial. After the Record of Previous Convictions has been marked for identification (See page 48-24, MCM, 1969 (Rev.)) and shown to the defense counsel, the introduction proceeds as follows:

TC: Prosecution Exhibit _____ for identification, a duly authenticated certified copy of the accused's military personnel record of previous conviction(s) by court-martial, is offered in evidence as Prosecution Exhibit _____.

DC: *(No objection). (The accused objects to _____ on the grounds that _____.)*

MJ *(Pros)*: Prosecution Exhibit _____ for identification is (no any) admitted in evidence as Prosecution Exhibit _____.

DEPARTMENT OF THE ARMY
COMPANY B, 1st BATTALION, 16th INFANTRY
FORT ARLINGTON, VIRGINIA 22901

Data Required by the Privacy Act of 1974
(5 U.S.C. 552a)

AUTHORITY: Section 301, Title 5, U.S.C. and Section 3012, Title 10, U.S.C.

PURPOSE: To be used by the commander exercising general court-martial jurisdiction over you to determine approval or disapproval of your request.

ROUTINE USES: Request, with appropriate documentation including the decision of the discharge authority, will be filed in the MPRJ as permanent material and disposed of in accordance with AR 640-10, and may be used by other appropriate Federal agencies and State and local governmental activities where use of the information is compatible with the purpose for which the information was collected.

Submission of a request for discharge is voluntary. Failure to provide all or a portion of the requested information may result in your request being disapproved.

18 November 199X

MEMORANDUM THRU

Commander, B Company, HQ, 1/16th Infantry, Fort Arlington, Virginia

Commander, HQ, 1/16th Infantry, Fort Arlington, Virginia

Commander, HQ, 2d Brigade, 26th Cavalry Division (AM), Fort Arlington, Virginia

FOR Commanding General, 26th Cavalry Division (AM), Fort Arlington, Virginia

SUBJECT: Request for Discharge for the Good of the Service (Chapter 10, AR 635-200)

1. I, THOMAS L. AMHERST, SSN 429-86-4723, hereby voluntarily request discharge for the good of the

Service under chapter 10, AR 635-200. I understand that I may request discharge for the good of the Service because of the following charge(s) which ~~(has)~~ (have) been preferred against me under the Uniform Code of Military Justice, each of which authorizes the imposition of a bad conduct or dishonorable discharge: larceny; resisting apprehension.

2. I am making this request of own free will and have not been subjected to any coercion whatsoever by any person. I have been advised of the implications that are attached to it. By submitting this request for discharge, I acknowledge that I am guilty of the charge(s) against me or of (a) lesser included offense(s) therein contained which also authorize(s) the imposition of a bad conduct or dishonorable discharge. Moreover, I hereby state that under no circumstances do I desire further rehabilitation, for I have no desire to perform further military service.

3. Prior to completing this form, I have been afforded the opportunity to consult with appointed counsel for consultation (*in addition, I have consulted with ~~(civilian counsel retained at no expense to the Government)). (**Although I have received a lawful order to see consulting counsel, I persist willfully in my refusal to see him.)~~ (***I have consulted with counsel for consultation who has fully advised me of the nature of my rights under the Uniform Code of Military Justice, (the elements of the offenses(s) with which I am charged, any relevant less included offenses(s) thereto, and the facts which must be established by competent evidence beyond a reasonable doubt to sustain a finding of guilty; the possible defenses which appear to be available at this time; and the maximum permissible punishment if found guilty) ~~(and of the legal effect and significance of my suspended discharge)~~. (Although he has furnished me legal advice, this decision is my own.) (****I understand that, pursuant to a delegation of authority per paragraph 1-21l, my request for discharge for the good of the Service may be approved by the commander exercising special court-martial convening authority (a lower level of approval than the general court-martial convening authority or higher authority, but the authority to disapprove a request for discharge for the good of the Service may not be delegated.))

4. I understand that, if my request for discharge is accepted, I may be discharged under other than honorable conditions and furnished an Under Other Than Honorable Discharge Certificate. I have been advised

and understand the possible effects of an Under Other Than Honorable Discharge and that, as a result of the issuance of such a discharge, I will be deprived of many or all Army benefits, that I may be ineligible for many or all benefits administered by the Veterans Administration, and that I may be deprived of my rights and benefits as a veteran under both Federal and State law. I also understand that I may expect to encounter substantial prejudice in civilian life because of an Under Other Than Honorable Discharge. I further understand that there is no automatic upgrading nor review by any Government agency of a less than honorable discharge and that I must apply to the Army Discharge Review Board or the Army Board for the Correction of Military Records if I wish review of my discharge. I realize that the act of consideration by either board does not imply that my discharge will be upgraded.

5. I understand that, once my request for discharge is submitted, it may be withdrawn only with consent of the commander exercising court-martial authority, or without that commander's consent, in the event trial results in an acquittal or the sentence does not include a punitive discharge even though one could have been adjudged by the court. Further, I understand that if I depart absent without leave, this request may be processed and I may be discharged even though I am absent.

6. I have been advised that I may submit any statements I desire in my own behalf, which will accompany my request for discharge. Statements in my own behalf ~~(are)~~ (are not) submitted with this request.

7. I hereby acknowledge receipt of a copy of this request for discharge and of all inclosures submitted herewith.

THOMAS L. AMHERST
PFC, 429-86-4723
B Company, 1/16th Infantry
Fort Arlington, Virginia

Having been advised by me of (the basis for his or her contemplated trial by court-martial and the maximum permissible punishment authorized under the Uniform Code of Military Justice) ~~(the significance of his or her suspended sentence to a bad conduct or dishonorable discharge)~~; of the possible effects of an Under Other Than Honorable Discharge if this request is approved; and of the procedures and rights available to him ~~or her~~, Thomas L. Amherst personally made the choice indicated in the foregoing request for discharge for the good of the Service.

HAROLD R. BEEKER
Captain, JAGC
Defense Counsel

United States	)	Fort Arlington, Virginia
	)	
v.	)	2 Dec 199X
	)	
THOMAS L. AMHERST	)	
Private First Class	)	
429-86-4723	)	

OFFER TO PLEAD GUILTY

I, Private First Class Thomas L. Amherst, the accused in a court-martial now pending, have had an opportunity to examine the charges preferred against me and all statements and documents attached thereto; and after consulting with my defense counsel, Captain Harold R. Beeker, and being fully advised that I have a legal and moral right to plead not guilty to the Charges and Specifications upon which I am about to be tried, to wit:

Charge I: Violation of Article 121, Uniform Code of Military Justice, containing one specification of larceny of $180.00

ChargeII: Violation of Article 95, Uniform Code of Military Justice, containing one specification of resisting apprehension, make the following offer.

I offer to plead guilty to the lesser included offense of wrongful appropriation with respect to Charge I, by substituting the words "wrongfully appropriate" for the word "steal," provided that the government will present no evidence on the greater offense of Charge I or on Charge II, and further provided that the convening authority will not approve any sentence in excess of the sentence on Appendix 1 to this offer.

I agree to enter into a stipulation of fact concerning the offense to which I am pleading guilty, in accordance with R.C.M. 705(c)(2)(A).

I am satisfied with the defense counsel detailed to defend me.

This offer to plead guilty originated with me and no person has made any attempt to force or coerce me into making this offer or to plead guilty.

My defense counsel has advised me of the meaning and

effect of my guilty plea and I understand the meaning and effect thereof.

I understand that I may request to withdraw my plea of guilty at any time before the sentence is adjudged, but that my request may not be granted.

I further understand that this agreement will be cancelled if either I or the convening authority withdraws from it before trial, or if I fail to fulfill any material promises or conditions in the agreement, or if the findings are set aside because my plea of guilty is held improvident on appellate review, or if an inquiry by the military judge discloses a disagreement concerning a material term in the agreement.

HAROLD R. BEEKER
CPT, JAGC
Defense Counsel

THOMAS L. AMHERST
PFC, 429-86-4723
Accused

Recommend Approval.

HENRY J. HOBIT
CPT, JAGC
Trial Counsel

The foregoing offer is (accepted) (not accepted).

_____
(Date)

JAMES E. WALKER
COL, IN
Commanding

UNITED STATES	)	Fort Arlington, Virginia
	)	
v.	)	2 Dec 199X
	)	
THOMAS L. AMHERST	)	
Private First Class	)	
429-86-4723	)	

OFFER TO PLEAD GUILTY

APPENDIX I

In exchange for my plea of guilty as specified in the attached Offer to Plead Guilty, the convening authority agrees to approve no sentence in excess of confinement for three months, forfeiture of $200.00 pay per month for three months, and reduction to the lowest enlisted grade.

HAROLD R. BEEKER
CPT, JAGC
Defense Counsel

THOMAS L. AMHERST
PFC, 429-86-4723
Accused

HENRY J. HOBIT
CPT, JAGC
Trial Counsel

JAMES E. WALKER
Colonel, IN
Commanding

Amherst Problem--Post-Trial Problems

1. **Facts**:

You are the Commander of the 2d Brigade of the 26th Cavalry Division, Fort Arlington, Virginia. This afternoon you are informed by the trial counsel in the case of United States v. Private First Class Thomas L. Amherst, a member of your command, that Amherst was tried this morning and was found guilty of larceny. The trial counsel tells you that the accused's sentence as announced by the court was confinement for six months, forfeiture of $100 pay per month for six months, and reduction to the lowest enlisted grade.

Upon being informed of this, you ask her to give you some more details as to what happened at trial. She informs you that PFC Amherst had little difficulty at the trial before a military judge, sitting without court members, in pleading guilty to wrongful appropriation even though the judge seemed concerned that Amherst did not have a criminal state of mind when he took the $180. Pursuant to the pretrial agreement, the Government presented no evidence on the offense of resisting apprehension. However, she indicates that the defense counsel introduced substantial evidence at trial to indicate that it was Amherst's intent to return the money as Amherst had done on prior occasions with other members of the unit when he "borrowed" money without their knowledge. (In fact, on one prior occasion he took $20 from Northfield without Northfield's knowledge, but repaid him three days later). The evidence during sentencing indicated that Amherst needed the $180.00 to pay his mother's doctor bill, and that Amherst intended to repay Specialist Northfield on payday. He also testified that he had attempted to see his company commander but was delayed by the first sergeant to the point where he did not feel the bill could remain unpaid. She also indicates that upon completion of the trial, Amherst complained vigorously that his serial number as shown on page 1 of the charge sheet was erroneous.

Trial counsel also relates that Amherst has submitted a written request to you that his sentence to confinement be deferred under Article 57(d) of the Uniform Code of Military Justice.

2. **Requirement**:

a. May you take action as to the findings and sentence in the case as a result of your conversation with the trial counsel?

b. If not, at what point and time may you take action?

c. What matters should you consider prior to taking action to approve or disapprove the findings and/or sentence in the case?

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CHAPTER NINE

THE AMHERST PROBLEM

TEACHING OUTLINE

I. INTRODUCTION.

II. COURT-MARTIAL PACKET.

A. Forwarding Endorsement.

1. What if endorsement is missing?

2. Contents.

a. Whether accused offered nonjudicial punishment.

b. Summary of evidence to be attached.

c. Statements that all material witnesses will be available at time of trial.

d. Character of accused's service.

e. Personal recommendation as to disposition.

B. Charge Sheet.

1. Heading.

a. Personal data.

b. Nature of restraint.

(1) Article 10 speedy trial concerns if accused is in arrest, confinement, or restriction tantamount to confinement.

(2) 120 day speedy trial clock otherwise.

2. Charges and specifications.

a. Larceny.

b. Resisting apprehension.

c. Jurisdiction over the offense -- Solorio.

3. Block 11 -- Accuser/Preferral of charges.

4. Block 12 -- Notice of preferral.

5. Block 13 -- Receipt by SCMCA.

6. Block 14 -- Referral.

a. UCMJ options.

b. Administrative options.

7. Block 15 -- Trial counsel's service of charges.

a. Time limit for GCM: 5 days.

b. Time limit for SPCM: 3 days.

C. Evaluation of the Evidence.

1. Rights warning and accused's statement.

2. Witness statements.

3. Note: AR 190-30, para 3-7f.

"Barracks larcenies of property of a value of less than $1000 and simple assaults not requiring hospitalization that occur in unit areas will be reported to law enforcement activities for statistical and crime reporting purposes, but a law enforcement investigation will not be required ... [but normally will] when requested by a field grade commander in the chain of command of the unit concerned."

4. Considerations for decision on disposition.

III. INVOLVEMENT WITH DEFENSE COUNSEL.

A. Request for Discharge in Lieu of Court-Martial (Ch 10, AR 635-200).

1. Procedures.

2. When appropriate?

B. Pretrial Agreement.

1. Contents/Negotiations.

2. Procedure at trial.

IV. SENTENCING AT COURTS-MARTIAL.

A. Effective dates.

1. Confinement.

2. Other punishments.

B. Excess leave (appellate leave).

V. POST-TRIAL RESPONSIBILITIES.

A. Preparation of Record.

B. Authentication of Record.

C. Action by Convening Authority.

D. Requests for Deferment of Confinement.

VI. CONCLUSION.

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CHAPTER 10

IMPROPER SUPERIOR-SUBORDINATE RELATIONSHIPS, FRATERNIZATION, AND SEXUAL HARASSMENT

Table of Contents

MAJ William Barto
MAJ Amy Frisk

JUDGE ADVOCATE OFFICER ADVANCED COURSE

IMPROPER SUPERIOR-SUBORDINATE RELATIONSHIPS, FRATERNIZATION, AND SEXUAL HARASSMENT

Outline of Instruction

I. REFERENCES.

A. Statutes.

1. Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1988).

2. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.).

B. DoD Directive 1350.2, DoD Military Equal Opportunity Program, 23 December 1988.

C. Army Regulations.

1. Dep't of Army, Reg. 600-20, Personnel - General: Army Command Policy (30 Mar 88)[hereinafter AR 600-20].

2. Dep't of Army, Reg. 690-600, Civilian Personnel: Equal Opportunity Discrimination Complaints (18 Sep 89).

3. Dep't of Army, Reg. 690-700, Civilian Personnel: Personnel Relations and Services (15 Nov 81).

D. Navy, Marine Corps and Air Force References

1. U.S. Navy Regulations, 1990, Article 1165 - Fraternization Prohibited.

2. OPNAVINST 5370.2A, Navy Fraternization Policy.

3. Marine Corps Manual 1100.4.

4. U.S. Navy Regulations, 1990, Article 1166 - Sexual Harassment (25 Jan 93).

5. Secretary of the Navy (SECNAV) Instruction 5300.26B, Policy on Sexual Harassment (6 Jan 93).

6. Department of Air Force Regulation 35-62, Policy on Fraternization and Professional Relationships (16 Apr 90)

E. Miscellaneous Publications and Pamphlets.

1. Manual for Courts-Martial, United States, 1984 [hereinafter MCM].

2. Dep't of Army, Pam. 600-35, Personnel - General: Relationships Between Soldiers of Different Rank (7 Dec 1993).

II. INTRODUCTION.

A. Three Separate Concepts.

B. A Spectrum of Misconduct.

III. IMPROPER SUPERIOR - SUBORDINATE RELATIONSHIPS.

A. Army Policy. AR 600-20, para 4-14.

1. Relationships between soldiers of different rank that involve, or give the appearance of, partiality, preferential treatment, or the improper use of rank or

position for personal gain, are prejudicial to good order, discipline, and high unit morale; it is Army policy that such relationships will be avoided.

2. Emphasis on superior-subordinate relationship, e.g., direct command/supervisory authority, or capability to influence personnel or disciplinary actions.

3. Commanders and supervisors will counsel those involved or take other action, as appropriate.

B. Three specific prohibitions:

1. Partiality or preferential treatment.

a. Potential/appearance - counsel initially.

b. Actual favoritism - adverse action appropriate.

2. Improper use of rank.

3. Relationships that have an actual or clearly predictable adverse impact on discipline, authority, or morale.

C. The Bottom Line.

1. Commanders' actions should <u>not</u> result in an unfavorable evaluation or efficiency report, relief from command, or other significant adverse action <u>unless</u> there is a finding of either actual favoritism or the improper exploitation of rank or position by the superior, or some actual or clearly predictable adverse impact on discipline, authority, or morale.

2. The adverse action must address the behavior which results from the relationship, or the actual or clearly predictable results of the relationship, and not merely the relationship itself.

D. Administrative Measures.

1. Lesser Actions.

a. Counsel.

b. Reassignment.

c. Oral or written admonitions or reprimands.

2. Significant Adverse Actions.

a. Adverse OER/EER.

b. Bar to reenlistment.

c. Relief.

d. Administrative separation.

IV. FRATERNIZATION AND RELATED OFFENSES.

A. General.

1. Fraternization is easier to describe than define, and it is seldom the subject of command attention unless it occurs along with some other criminal offense.

2. The stereotypical case: officer engages in sexual intercourse with enlisted person and either the officer, the enlisted person, or both are married to others.

a. The relationship is revealed to the chain of command by a jilted partner.

b. Criminal charges may include adultery and fraternization.

B. Fraternization. UCMJ art. 134.

1. The President has expressly forbidden officers from fraternizing on terms of military equality with enlisted personnel. MCM, pt. IV, ¶ 83b.

2. Elements: the accused

a. was a commissioned or warrant officer;

b. fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

c. knew the person(s) to be (an) enlisted member(s); and

d. such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and

e. Under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

3. Article 134 has also been successfully used to prosecute instances of officer-officer fraternization, United States v. Callaway, 21 M.J. 770 (A.C.M.R. 1986), and even enlisted-enlisted relationships. United States v. Clarke, 25 M.J. 631 (A.C.M.R. 1987), aff'd, 27 M.J. 361 (C.M.A. 1989).

4. Maximum punishment: dismissal/dishonorable discharge, total forfeitures and two years confinement. MCM, pt. IV, ¶ 83e.

5. Custom.

a. The gist of this offense is a violation of the custom of the armed forces against fraternization; it does not prohibit all contact or association between officers and enlisted persons.

b. Custom of the service must be proven through the testimony of a knowledgeable witness. United States v. Wales, 31 M.J. 301 (C.M.A. 1990).

C. Failure to Obey Lawful General Order or Regulation. UCMJ art. 92.

1. Elements. MCM, pt. IV, ¶ 16b(1).

a. There was in effect a certain lawful general order or regulation;

b. the accused had a duty to obey it; and

c. the accused violated or failed to obey the order or regulation.

2. Maximum punishment: dismissal/dishonorable discharge, total forfeitures and two years confinement. MCM, pt. IV, ¶ 16e(1).

3. Applications.

a. Applicable to officers and enlisted.

b. Most effective when used to charge violations of local punitive general regulations (for example, regulations prohibiting improper relationships between trainees and drill sergeants).

D. Conduct Unbecoming an Officer. UCMJ art. 133.

1. Elements.

a. Accused did or omitted to do certain acts; and

b. That, under the circumstances, the acts or omissions constituted conduct unbecoming an officer and gentleman.

2. Only commissioned officers and commissioned warrant officers may be charged under article 133.

3. Maximum punishment: dismissal, total forfeitures and confinement for a period not in excess of that authorized for the most analogous offense for which punishment is prescribed in the Manual, e.g., two years for fraternization.

V. SEXUAL HARASSMENT

A. Army Policy. AR 600-20, para. 6-4 (IO4, 17 Sep 93).

Sexual harassment interferes with mission accomplishment and unit cohesion and will not be tolerated.

B. Definition. Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature **when**

1. submission to or rejection of such conduct is a term/condition of a person's job, pay, or career; or used as a basis for career or employment decisions affecting that person; **[Quid pro quo]**
or

2. such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment **[Hostile environment].**

C. Vicarious Responsibility and Civil Liability.

A supervisor or commander who "knew or should have known" of acts of sexual harassment by subordinates and who fails to take corrective action may be held responsible for the sexual harassment.

D. Setting and Enforcing Command Climate.

1. Policy letter.

2. What is IG/EEO/EO climate?

3. Ensure mandatory training is conducted.

4. Public reaction to improper comments/jokes.

5. Publicize disciplinary action taken against harassers.

E. Sexual Harassment Discussion Points:

1. Violates acceptable standards of integrity and impartiality required of all Army personnel.

2. Involves a spectrum of unacceptable behaviors from typical dating behaviors (language and customs) to criminal acts.

F. Examples:

1. Verbal: Unwanted sexual teasing, jokes with sexual overtones/innuendo, personal questions about sexuality, comments on appearance and fit of clothing other than performance counseling, pressure for dates or sexual favors, and/or starting or spreading rumors about a person's sexual habits.

2. Written: Unwanted suggestive notes or memos, pictures or sayings of a sexual nature in the workplace.

3. Physical or Nonverbal: Unwanted sexual looks, stares, gestures; unwanted deliberate touching, patting, leaning over, bumping against, cornering, pinching, caressing, and/or kissing.

4. Egregious behavior may be criminal.

G. Scope.

The prohibition against sexual harassment is not limited to the work site or to duty hours.

H. Other Gender Discrimination.

1. Preferential treatment because of one's gender is prohibited.

2. Either same sex or opposite sex.

I. Sanctions for Engaging in Sexual Harassment.

1. Civilian employees (AR 690-600, Equal Employment Opportunity Discrimination Complaints).

Civilian employees may be subjected to administrative discipline for engaging in sexual harassment in accordance with the current Army Table of Penalties (AR 690-700, ch. 751, Table 1-1):

NATURE OF OFFENSE	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
Harassment involving a subordinate	1-day suspension to removal	10-day suspension to removal	30-day suspension to removal
Harassment not involving a subordinate	Written reprimand to 30-day suspension	5-day suspension to removal	10-day suspension to removal

2. Soldiers (AR 600-20, Chap 6, Equal Opportunity Program in the Army).

a. Administrative action.

b. UCMJ action.

VI. CRIMINAL ASPECTS OF SEXUAL HARASSMENT.

A. Sexual Harassment by Superior Officer or NCO.

1. Maltreatment of Subordinate. UCMJ art. 93.

a. Elements. MCM, pt. IV, ¶ 17.b.

(1) A certain person was subject to the orders of the accused; and

(2) the accused was cruel toward, or oppressed, or maltreated that person.

b. Maximum Punishment: Dismissal/dishonorable discharge, total forfeitures, confinement for one year.

2. Unbecoming Conduct. UCMJ art. 133.

a. United States v. Hanson, 30 M.J. 1198 (A.F.C.M.R. 1990), aff'd, 32 M.J. 309 (C.M.A.), cert. denied, 500 U.S. 933 (1991)(male officer's suggestive comments to male subordinates, even if done in jest, amounted to maltreatment).

b. United States v. McCreight, 39 M.J. 530 (A.F.C.M.R. 1994)(no maltreatment in the absence of threat made in order to induce enlisted member to have intercourse).

c. United States v. Shober, 26 M.J. 501 (A.F.C.M.R. 1986) (sexually exploiting civilian waitress accused was charged with supervising was

conduct unbecoming an officer and a gentleman).

d. United States v. Parini, 12 M.J. 679 (A.C.M.R. 1981) (colonel's attempts to extract sexual favors from subordinates in return for favorable treatment constituted conduct unbecoming).

3. UCMJ art. 134 - The General Article.

a. Clause 1 - accused's conduct was to the prejudice of good order and discipline.

b. Clause 2 - accused's conduct was of a nature to bring discredit upon the armed forces in the view of the civilian community.

B. Sexual Harassment of Superior by a Subordinate.

1. UCMJ art. 89 - Disrespect toward a Superior Commissioned Officer.

United States v. Dornick, 16 M.J. 642 (A.F.C.M.R. 1983) (accused convicted of disrespect toward LT by saying to her, "Hi sweetheart").

2. UCMJ art. 91 - Insubordinate Conduct Toward Warrant Officer, Noncommissioned Officer, or Petty Officer.

C. Other Potentially Related Offenses.

1. Disobedience of Local Punitive Regulation.

2. Dereliction of Duty.

A commander or supervisor may commit dereliction of duty if they fail to take any action following a report of sexual harassment. See AR 600-20, ¶ 6-4b (IO4, 17 Sept 1993). But cf. United States v. Wheatley, 28 C.M.R. 461 (A.B.R. 1959)(commander not guilty of maltreatment when "he ignores and fails to censor the horse-play and language of his enlisted subordinates whenever it exceeds the bounds of good taste.").

3. Provoking Speeches or Gestures. UCMJ art. 117.

4. Sodomy. UCMJ art. 125.

5. Extortion. UCMJ art. 127.

United States v. Hicks, 24 M.J. 3 (C.M.A. 1987) (extracting sexual favors from civilian female in return for not reporting her boyfriend's violation of unit policy letter was extortion).

6. Assault. UCMJ art. 128.

United States v. Bonano-Torres, 31 M.J. 175 (C.M.A. 1990) (touching victim's blouse in attempt to unbutton it qualified as a battery).

7. Adultery. UCMJ art. 134.

a. United States v. Wales, 31 M.J. 301 (C.M.A. 1990) (sexual relationship between officer and enlisted subordinate).

b. United States v. Lowery, 21 M.J. 998 (A.C.M.R. 1986) (officer convicted of fraternization, adultery, and

maltreatment based on relationships with enlisted women).

8. Fraternization. UCMJ art. 134. See cases cited in the previous discussion of fraternization and related offenses.

9. Indecent Assault. UCMJ art. 134.

United States v. Robinson, 37 M.J. 588 (A.F.C.M.R. 1993)(accused commits indecent assault upon subordinate by actively grinding his groin against victim's buttocks.

10. Indecent Language. UCMJ art. 134.

11. Indecent Acts With Another. UCMJ art. 134.

United States v. Athey, 34 M.J. 44 (C.M.A. 1992) (officer convicted of engaging in indecent acts with female office employee).

12. Communication of a Threat. UCMJ art. 134.

VII. CONCLUSION.

APPENDIX ONE

CASE LAW: FRATERNIZATION AND RELATED OFFENSES

United States v. Kroop, 38 M.J. 470 (C.M.A. 1993).

Allegations of "undue familiarity" and "excessive social contacts" with married female service members were insufficient to allege unbecoming conduct.

United States v. Parillo, 34 M.J. 112 (C.M.A. 1992).

Accused convicted of conduct unbecoming an officer for engaging in sexual relationships with enlisted airmen over whom she exercised supervision.

United States v. Appel, 31 M.J. 314 (C.M.A. 1990).

Fraternization conviction of Air Force major upheld; accused held hands, hugged, kissed, and shared hotel room with woman who was alleged and proven to be under major's supervision.

United States v. Guaglione, 27 M.J. 268 (C.M.A. 1988).

Conviction under Article 133 for fraternization set aside where 1LT visited a brothel in Frankfurt with three enlisted soldiers, entered out of curiosity, partook of no services, and was not the platoon leader of the soldiers. Court accepted premise that officer may be held to higher standard than enlisted or a civilian, but reversed because of insufficient notice to officer corps that such conduct was criminal, i.e., unbecoming under Article 133.

United States v. Tedder, 24 M.J. 176 (C.M.A. 1987).

Fraternization conviction upheld of Marine Corps Captain, unit legal officer (not a JAG), who socialized on first name basis and had sexual

intercourse with enlisted woman who initially consulted with him about legal problem.

United States v. Adames, 21 M.J. 465 (C.M.A. 1986).

Fraternization conviction upheld of Army officer, who was XO of AIT training company, for attending off-post party with female trainees from his company where alcohol and sexual promiscuity were present.

United States v. Mayfield, 21 M.J. 418 (C.M.A. 1986).

Fraternization conviction upheld of Army officer who sought date from enlisted trainee on three occasions in violation of punitive policy issued by the CG, Fort Lee. Consent by the enlisted soldier is neither relevant nor an element of a fraternization charge.

United States v. McCreight, 39 M.J. 530 (A.F.C.M.R. 1994).

Officer unlawfully fraternized with enlisted subordinate by repeatedly drinking with subordinate under circumstances in which subordinate was "designated driver" and officer was "designated drunk," by allowing subordinate to sleep over in his off-base apartment on numerous occasions, and by sharing details of his sexual conquest of another subordinate's wife.

United States v. Cisler, 33 M.J. 503 (A.F.C.M.R. 1991).

Colonel convicted of conduct unbecoming an officer for dating an airman, not his wife, while married; accused also convicted of disobeying the order of a LTG not to associate with the airman.

United States v. Clarke, 25 M.J. 631 (A.C.M.R. 1987), aff'd, 27 M.J. 361 (C.M.A. 1989).

"[N]oncommissioned officers are on notice that fraternization with enlisted subordinates is an offense punishable under the provisions of Article 134, UCMJ."

United States v. Sartin, 24 M.J. 873 (A.C.M.R. 1987).

Regulation proscribing fraternization between permanent party personnel and soldiers in training status was not overbroad in extending definition of "training status" until departure from post on PCS.

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CHAPTER 11

MOST FREQUENTLY ASKED QUESTIONS

1. Is it proper to publicize the results of Article 15s and courts-martial?

Yes, for both.

Article 15s - AR 27-10, para. 3-22 permits Article 15 punishments to be announced at unit formations or posted on the bulletin board to preclude perceptions of unfairness and to deter similar misconduct. Special consideration should be given before publicizing Article 15s involving E-5s and above.

Courts-Martial - It is permissible to publicize the results of courts-martial in the post newspaper or otherwise. Courts are public proceedings. A couple of tips: publicize the fact of an acquittal in addition to convictions, but not the name of the soldier acquitted. It is permissible to use the names of soldiers convicted, but wait until the soldier's family has departed the command. This will spare the family needless embarrassment.

2. As a court member, why doesn't someone tell us there is a pretrial agreement before we decide on a sentence?

The simple answer is that this information is not relevant to your task of deciding on a fair and just sentence based on the evidence presented at trial. An accused has the right to offer to plead guilty in return for a sentence limitation, or some other advantage. The convening authority can accept or reject the offer. Whether the offer to plead guilty is accepted or rejected is the prerogative of the convening authority. Court members may be more likely to "max" an accused if they knew a pretrial agreement existed. For this reason, this information is not given to the court panel, nor should the members let the possibility of an agreement affect their sentencing decision.

3. As a court member, why doesn't someone tell us that the reason we're in court for relatively minor offenses is because the accused turned down an Article 15?

This information is not relevant to the case at hand. All soldiers have a right under the UCMJ to refuse an Article 15 or a Summary Court-Martial. No reason need

be stated. A court member may be harder on an accused who demanded trial in lieu of Article 15 because "he is wasting our time."

This is an improper consideration, and may lead to a finding and sentence not based solely on the evidence presented at trial.

4. As a commander, can I offer a soldier an Article 15 while I begin processing court-martial charges for the same offense(s)?

No. A commander can do one or the other, but not both. The law does provide that if a commander administers Article 15 punishment for a "major" offense (punishment for the offense includes a dishonorable discharge or more than 1 year confinement as listed in the MCM), a higher commander may still initiate court-martial charges for the same offense, and if convicted, the accused may submit his Article 15 punishment on sentencing to receive full credit against his court-martial punishment.

5. When a soldier "turns down" an Article 15, and then later asks that it be reinstated, must a commander reinstate it?

No. Reinstating the Article 15 is at the discretion of the commander. Timing may be the key factor here. If the soldier requests reinstatement soon after the initial turn down, and the government has expended little or no additional resources in preferring and referring charges, fairness dictates that the commander favorably consider reinstatement. This is especially so if the soldier turned down the Article 15 before consulting with defense counsel.

6. How does a Chapter 10 discharge affect a soldier's educational benefits?

From 1976 to 1985, we operated under a system where a soldier could contribute up to $2700 and get $2 for every $1 contributed ($8100 max). The soldier could reclaim his contributions unless he received a dishonorable discharge.

Under the new G.I. Bill (Montgomery Bill), effective July 1985, the soldier can contribute up to $1200. The soldier can get up to $8 for every $1 contributed. The soldier, however, loses <u>all</u> money, including contributions, unless he receives an honorable discharge.

7. If I want to apprehend a soldier in his government quarters or his off-post housing, I am required to get an arrest warrant. Does this make it illegal for me to call a soldier on the phone and order them to report to my unit and then apprehend him?

No. Most courts that have addressed this issue agree that the warrant requirement is designed to protect an individual's right to privacy in their home. Therefore, as long as the commander doesn't cross the threshold of the front door, no warrant is required.

8. I'm walking through my barracks and I walk into a room and see three soldiers and a bag of marijuana on a desk in a common area. If I want to question those soldiers about the marijuana, must I advise them of their rights?

Yes, if you suspect a soldier of criminal activity then you must advise them of their rights. Therefore, if you suspect any or all three of the soldiers, you must read them their rights, preferably, one at a time.

9. How can a soldier seek redress regarding military discharge classifications, and what are the effects of military discharge classifications on veterans' benefits eligibility?

Two avenues are available to discharged soldiers who wish to have their discharge classifications upgraded. One alternative is to petition the Army Discharge Review Board, which is empowered to hear and decide motions for upgrading filed within 15 years of discharge. A second option is to petition the Army Board for Correction of Military Records, which has broad authority to correct any military record including discharge certificates.

Discharged soldiers are not generally eligible for VA benefits if their discharge is classified as being dishonorable by the VA. The VA has limited discretion in making this classification. Soldiers who receive dishonorable or bad conduct discharges at general courts-martial are per se barred from receiving VA benefits. The eligibility of soldiers for VA benefits who receive a bad-conduct discharge at a special court-martial, or an administrative discharge under other than honorable conditions, will be considered by the VA on a case-by-case basis. The VA rules provide that the conditions of the discharge are disqualifying if they involve mutiny or spying, moral turpitude (generally, conviction of a felony), acceptance of a discharge to escape trial by

general court-martial, willful and persistent misconduct, and in some cases homosexual acts. The VA classification has no effect on the changing of the classification of the discharge assigned by the Army.